

Before the Building Practitioners Board

	BPB Complaint No. CB25774
Licensed Building Practitioner:	[OMITTED] (the Respondent)
Licence Number:	BP [OMITTED]
Licence(s) Held:	Carpentry

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 Type:	On the papers
Decision Date:	25 August 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
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.

Contents

Summary of the Board’s Decision	2
The Board	2
The Charges	2
Function of Disciplinary Action	2
Inquiry Process	3
Background to the Complaint	4
Evidence	4
Board’s Conclusion and Reasoning	6
Publication	8
Suppression	8

Summary of the Board’s Decision

[1] The Respondent has not committed a disciplinary offence.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

The Charges

[3] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² 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

[4] 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 Section 341 of the Act.

² 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

- [5] 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*,⁵ 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.”

- [6] 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.⁶

... 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.

- [7] 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.

- [8] The above commentary on the limitations of the disciplinary process is 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

- [9] 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

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *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.

- [10] 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.

Background to the Complaint

- [11] The matter had been set down for an in-person hearing on 13 July 2022 in Auckland. However, due to the unavailability of the Complainant, a summonsed witness, the hearing was adjourned to 25 August 2022. Leave was also granted for the Auckland Council to file evidence by affidavit.
- [12] Following the adjournment, the Board received further evidence from the Respondent and the Council (which was provided to the Respondent).
- [13] The day prior to the scheduled hearing, the Respondent advised that he was not well and could not attend in person or by audio-visual link. The in-person hearing was adjourned.
- [14] The Board gave notice that it would still meet and considered the complaint. It noted that further evidence had been filed and that the matter now turned on legal issues and that the Board had decided that it would proceed to make an on-the-papers decision.

Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [16] The complaint related to an alleged failure to provide a record of work on completion of restricted building work. The building work was an addition and alteration to a residential dwelling. The building work was carried out under a building consent that was issued on 25 September 2019.
- [17] The Board received an affidavit from a Senior Building Surveyor in the employ of Auckland Council, who issued the building consent. The consent noted an application for an owner-builder exemption under section 90D of the Act. The application was accompanied by a Statutory Declaration which stated that the owner intended to carry out the following restricted building work:

- (a) *Foundations and subfloor framing;*
- (b) *Walls;*

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (c) *Ventilations system;*
- (d) *Wall cladding or wall cladding system; and*
- (e) *Waterproofing.*

[18] The building consent was issued on the basis that an owner-builder exemption applied. The building consent included the following Advice Notice:

Restricted Building Work by Owner-Builders

An owner-builder may carry out restricted building work (RBW) without being supervised by a licensed building practitioner (LBP).

An owner-builder carrying out building work is responsible for ensuring that the work is compliant with the approved plans and specifications; this confirms that the building work is compliant with s. 14C of the Building Act 2004 and the Building Code.

An owner-builder is required to notify Council when carrying out RBW under the building consent. If the building consent application was not accompanied by a statutory declaration as to the owner-builder status, the owner must provide a statutory declaration before carrying out any RBW.

The owner-builder must also advise Council if there is a change in the owner-builder carrying out RBW or when the owner-builder ceases to carry out RBW. All notices must be in writing in the prescribed form.

[19] Notwithstanding the owner-builder exemption, the Complainant (the owner) engaged the Respondent to carry out foundations work on the build. The Complainant alleged the Respondent installed a new block nib wall. A building inspection dated 9 January 2020 for “Concrete block wall / nib / insitu (ICB)” noted the Respondent as the Licensed Building Practitioner. The inspection also noted “[OMITTED]” as being on-site. A membrane tanking inspection on 15 January 2020 also noted the Respondent as the Licensed Building Practitioner. Both inspection records contained the Respondent’s email address as the recipient’s email for inspection outcomes.

[20] An Auckland Council Code Compliance Certificate checklist noted, under records of work:

Foundations and DPM – copy of complaint acknowledgement provided – customer is unable to get ROW

20/01/2021 – RFI sent for Record of Building Works (ROW’S) from LBP involved in Foundation and DPM.

[21] The notation included a plan detail for a Concrete Floor Chase with a PVC pipe installed.

[22] Prior to the scheduled hearing, the Respondent submitted:

I submit that at the time these works were undertaken I genuinely believed that there was no restricted building work carried out by myself

The restricted work was carried out by contractors under the management of Mr [OMITTED] under an Owner Builder Consent

1. the drainage work and concrete chase was done by a registered drainlayer who provided a PS3 and also inspected by council and passed

2. The waterproofing was done by an accredited contractor who provided a PS3 and warrantee

3. the concrete nib was non structural and only to provide a threshold to the new door joinery as ground level and floor level were more or less the same was also inspected by council and passed (although was not required to be inspected)

If I am found to be incorrect as to my interpretation of the regulations with regard to the above it is due only to my misunderstanding of said regulations and not any kind of willful or deliberate act

I have a previously unblemished record as an LBP and I plead for leniency in this matter

I undertake to fully educate myself re the regulations thus avoiding the potential for any future misunderstandings

Board's Conclusion and Reasoning

[23] 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.

[24] The Board has made its decision on the basis of that the building work may not have been restricted building work and that further investigation of the issue, in the particular circumstances of the case, is not warranted. In this respect, the Board has taken into account that there was a genuine misunderstanding as to the implications of an owner-builder exemption.

[25] The Board does, however, take this opportunity to provide direction and guidance to other Licensed Building Practitioners that they must provide a record of work for any restricted building work that they carry out or supervise under a building consent on a residential dwelling.

[26] Owner-builder exemptions are provided for in section 90D of the Act:

90D Owner-builder exemption

(1) *A person who is an owner-builder in relation to restricted building work may carry out that restricted building work without being supervised by a licensed building practitioner.*

[27] The Act defines owner-builder:

90B Meaning of owner-builder

- (1) *An owner-builder, in relation to restricted building work, means a natural person who—*
- (a) *has a relevant interest in the land or the building on which the restricted building work is carried out; and*
 - (b) *resides, or intends to reside, in the household unit in relation to which the restricted building work is carried out; and*
 - (c) *carries out the restricted building work himself or herself or with the assistance of his or her unpaid friends and family members; and*
 - (d) *has not, under the owner-builder exemption, carried out restricted building work in relation to a different household unit within the previous 3 years.*
- (2) *For the purposes of subsection (1)(b), reside includes temporarily reside.*

[28] The key aspect, in respect of this decision and Licensed Building Practitioners, is that in section 90B(1)(c) that the owner *carries out the restricted building work himself or herself or with the assistance of his or her unpaid friends and family members.*

[29] Given the requirement that any person who assists the owner must do so without payment and on the basis that they are family or friends, a Licensed Building Practitioner who assists and does so for payment does not come within the owner-builder exemption.

[30] It follows that a Licensed Building Practitioner who carries out restricted building work in relation to an owner-builder exemption for reward must provide a record of work for any restricted building work that they carry out or supervise.

[31] A Licensed Building Practitioner should also take care when being engaged to carry out restricted building work on a building consent that has been issued under an owner-builder exemption that they do not, unwittingly, breach the building consent that has been issued. In this respect, a Licensed Building Practitioner should also note the provisions of section 89 of the Act, which places a positive burden on a

licensed building practitioner to notify a building consent authority of a breach of a building consent:

89 Licensed building practitioner must notify building consent authority of breaches of building consent

- (1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
 - (a) *the territorial authority in whose district the building is situated; and*
 - (b) *the owner.*
- (2) *The notification must—*
 - (a) *state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*
 - (b) *state how the building work does not so comply; and*
 - (c) *be given as soon as practicable after the licensed building practitioner forms that view.*

Publication

[32] The Board can only order public notification of a decision if it upholds a ground of discipline and imposes a penalty. This is because the publication provision forms part of the disciplinary penalties in section 318 of the Act. Notwithstanding, the matters traversed and the decisions made in this matter are important for the wider industry. It is important that the findings are disseminated. Accordingly, the Board will request that the Registrar develop and publish educational materials based on the decision.

Suppression

[33] Whilst the Board cannot order any further publication, that does not restrict persons seeking information about the Licensed Building Practitioner or the complaint.

[34] The Board's usual practice is to name Licensed Building Practitioners who appear in its decisions which are then published on its websites. Suppression orders can be used, however, to prevent a Licensed Building Practitioner being identified.

[35] Courts and tribunals generally have a power to suppress details relating to a hearing. Within the Building Act, however, the matter is not specifically dealt with in that the Board is not provided with an express power to suppress. This can be compared with the provisions of section 153 of the Electricity Act, which provides the Electrical Workers Registration Board with the power to prohibit publication. The question then is whether the Board has an ability to order suppression.

[36] The Board has found in previous decisions that it has, in certain respects, a summary jurisdiction. A summary jurisdiction is one in which the tribunal has a degree of flexibility in how it deals with matters and wherein it retains inherent jurisdiction beyond that set out in the enabling legislation. In *Castles v Standards Committee No.3*,⁸ the High Court held that the disciplinary jurisdiction under the Lawyers and Conveyance Act 2006, which contains the same provision as those in the Building Act, was a summary jurisdiction. In *Orlov v National Standards Committee 1*,⁹ the High Court put it as:

[29] Parliament has provided that the Tribunal is free to set its own procedure. Obviously it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to those constraints, the Tribunal has been given a high degree of procedural flexibility in the exercise of its important statutory functions.

[37] Given the above, the Board considers that it does have the inherent jurisdiction to order the suppression of details relating to a hearing.

[38] In New Zealand, there is a principle of open justice and open reporting. This is enshrined in the Bill of Rights Act.¹⁰ Ordinarily, good grounds need to be shown as to why a matter or details should be suppressed.

[39] The Criminal Procedure Act provides details on various grounds in respect of criminal matters. They are¹¹:

Publication would be likely to:

- (a) cause extreme hardship to the person charged, a witness or a person connected to those persons or the matters; or*
- (b) cast suspicion on another person that may cause undue hardship to those persons; or*
- (c) cause undue hardship to any victim of the offence; or*
- (d) create a real risk of prejudice to a fair trial; or*
- (e) endanger the safety of any person; or*
- (f) lead to the identification of another person whose name is suppressed by order or by law; or*
- (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or*

⁸ [2013] NZHC 2289

⁹ [2013] NZHC 1955

¹⁰ Section 14

¹¹ Refer ss 200 and 202 of the Criminal Procedure Act

(h) *prejudice the security or defence of New Zealand.*

[40] Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹². In *N v Professional Conduct Committee of Medical Council*,¹³ the High Court stated the tribunal must be satisfied that suppression is desirable having regard to the public and private interests, and consideration can be given to factors such as:

- (a) issues around the identity of other persons such as family and employers;
- (b) identity of persons involved and their privacy and the impact of publication on them; and
- (c) the risk of unfairly impugning the name of other practitioners if the responsible person is not named.

[41] The Board recognises that identifying the Respondent could unfairly impact him and, given the nature of the findings, a suppression order is appropriate. Accordingly, the Board orders that the Respondent's name and details are to be redacted from the published version of this decision.

Signed and dated this 17th day of November 2022



Mr M Orange
Presiding Member

¹² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹³ *ibid*