

## Before the Building Practitioners Board

	BPB Complaint No. CB25929
Licensed Building Practitioner:	Clinton Rutledge (the Respondent)
Licence Number:	BP 117137
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	Blenheim
Hearing Type:	In Person
Hearing and Decision Date:	23 November 2022

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Ms K Reynolds, Construction Manager  
Mr G Anderson, LBP, Carpentry and Site AoP 2

#### 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 a disciplinary offence. The Board found that he did not carry out or supervise restricted building work and so was not required to provide a record of work. The Board also found that the Respondent did not bring the licensing regime into disrepute on the basis that directions provided by the Building Consent Authority were relied on and created a misunderstanding as to the Respondent’s obligations.

### The Board

- [2] The Board is a statutory body established under the Building Act.<sup>1</sup> 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 Regulations<sup>2</sup> to hold a hearing in relation to building work at 2191 State Highway 63, Wairau Valley, Blenheim. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) 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

<sup>1</sup> Section 341 of the Act.

<sup>2</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act; and

- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.

- [4] In further investigating the conduct under section 317(1)(i) of the Act, the Board gave notice that it would be investigating whether the Respondent brought the regime into disrepute by agreeing to provide his licence details for the purported purpose of allowing restricted building work to be carried out with no intention of providing actual supervision for that restricted building work thereby defeating the purposes of the licensing regime.

### **Function of Disciplinary Action**

- [5] 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>3</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>4</sup>.

- [6] 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>5</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 maintained in order to protect clients, the profession and the broader community.”*

- [7] 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>6</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.*

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

<sup>4</sup> [1992] 1 NZLR 720 at p 724

<sup>5</sup> [2016] HZHC 2276 at para 164

<sup>6</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [8] 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.
- [9] 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**

- [10] 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.

**Evidence**

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</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.
- [12] 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.
- [13] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Clinton Rutledge	Respondent
[OMITTED]	Witness, builder
[OMITTED]	Building Control Officer
[OMITTED]	Building Control Officer
[OMITTED]	Building Control Officer

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<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[14] [OMITTED] was engaged by the Complainants to carry out alterations and addition as to their dwelling. Mr [OMITTED] had previously worked for a commercial building company, as had the Respondent. Mr [OMITTED] gave evidence that during his employment, his employer took responsibility for his licensing and that his contact details for licensing purposes were those of his employer. Those details were not changed when he left that employment. Mr [OMITTED]'s licence lapsed as a result of a failure to renew it. When he commenced the building work for the Complainants, he was not a Licensed Building Practitioner.

[15] The building work to be undertaken was on a residential dwelling. As such, it included restricted building work that must, under section 84 of the Act, be carried out or supervised by a Licensed Building Practitioner.

[16] Early on in the project, during a Pile inspection on 4 December 2020, [OMITTED] identified that Mr [OMITTED] was not a Licensed Building Practitioner. the inspection notes stated:

*The LBP licence of [OMITTED] has been expired and so he cannot carry on further construction work unless a LBP is appointed for this job.*

[17] A Sub Floor Framing inspection conducted by [OMITTED] on 9 December 2020 noted:

*His number is not current - will be re-instated prior to the Prewrap*

And

*[OMITTED]'s LBP Licence has expired but he is in the process of getting it reinstated. He is aware this needs to be finalised before the Prewrap inspection. He was a builder with [OMITTED] previously, so I allowed him to continue with the work.*

[18] Mr [OMITTED] gave evidence that he contacted the Respondent and asked if he could use his licence number. Mr [OMITTED] and the Respondent were known to each other and were familiar with each other's building competency. Both Mr [OMITTED] and the Respondent gave evidence that their expectation was that the provision of the Respondent's licence was an administrative matter. Neither considered that the Respondent would be providing actual supervision of the building work. The Respondent did not attend the site and was not consulted about the building work that was being undertaken. The Respondent stated he would not have agreed to his licence number being used if he had been required to supervise the building work.

[19] The Ministry of Business Innovation and Employment (MBIE) investigated Mr [OMITTED] for carrying out restricted building work when not authorised to do so. The Respondent was interviewed. He stated it was a temporary arrangement, and once Mr [OMITTED] was relicensed, the Council's records would revert back to Mr

[OMITTED]'s licence. He expressed surprise that he was expected to supervise and provide a record of work and that his licence was still being used in February 2021.

[20] In an email to the Complainants, Mr [OMITTED] stated:

*As you are well aware, having been on site for the build, Clinton did not do any work on your project, nor did he supervise any of [OMITTED]'s work, nor did he even come on site. There is no 'major complication' to use your words. We used Clinton's LBP number at the advice of the Building Inspector that did your second inspection. It was purely a solution to an admin blip..... [OMITTED] had an LBP but it had expired and the renewal notices had all been sent to his previous employer and not forwarded to us. The Building Inspector suggested we borrow a friends number simply to move to the next stage of the building process, they cannot sign off the first two inspections without an LBP number.*

[21] A Prewrap inspection record issued on the same date by [OMITTED] noted:

*They are expecting his LBP number within a week - process in place.  
In the meantime [OMITTED] is working under Clinton Rutledge who is known.*

[22] A Post wrap and or Cavity inspection carried out on 22 February 2022 noted the Respondent as the Respondent continued to be the Licensed Building Practitioner:

*Clinton Rutledge ([OMITTED] is having his LBP Status re-instated - it has been delayed.)*

[23] The inspection notes for each of the above inspections, when referencing issues with the building work, referred to Mr [OMITTED].

[24] Mr [OMITTED] obtained a Carpentry Licence on 18 February 2021. A Preline inspection on 1 March 2021 contained a photograph of Mr [OMITTED]'s new licence.

[25] An email from Mr [OMITTED] dated 11 January 2022 to Mr [OMITTED] stated:

*At the sub-floor inspection I allowed [OMITTED] to continue with the work as he was a builder with [OMITTED] previously and because his LBP Status would be re-instated by the next inspection which is the prewrap inspection. At the prewrap inspection when [OMITTED]'s LBP License was still being processed, I inform you that you need to get an LBP Builder to cover [OMITTED]'s work until his license is re-instated. I was informed by yourself that Clinton Rutledge BP117137 would cover [OMITTED]'s work and I have recorded this accordingly.*

[26] In response to the complaint, the Respondent stated:

*When he phoned me, I was told it was only a "temporary" measure and when his LBP license was renewed, my number would be replaced with his. I was*

*assured I did not need to actually do anything e.g. supervise or site related, and the council was happy with this arrangement.*

*As it was suggested by the council inspector, I thought I had no need to look into it any further, because if the people above me were happy-and suggested this solution to [OMITTED]'s problem-then I didn't see a problem either. I have since now realised this was a bad call on my part.*

And

*If this scenario of borrowing an LBP number is not acceptable by the council- surely they would put a STOP on the job from the start or at first inspection- rather than suggest this solution? I also thought the LBP on a job had to be present for council inspections? But council was happy to have a number of inspections with only [OMITTED] present-even though they knew his license had lapsed.*

- [27] Mr [OMITTED] and the Respondent answered questions about their understanding of the licensing regime. Both gave evidence that they had carried out very little restricted building work as their focus was mainly on commercial work. They displayed a rudimentary knowledge of the regime.
- [28] The Council witnesses were questioned about their processes as regards the requirement that Licensed Building Practitioners carry out or supervise restricted building work. Mr [OMITTED] stated they take their obligations seriously, and he noted that it was not always practicable for the Licensed Building Practitioners to be named prior to building work starting as per the requirements of section 87(1) of the Act. The Council witnesses were not aware of any change of Licensed Building Practitioner notices being filed during the build as per the requirements of section 87(2 and (3) of the Act.
- [29] Mr [OMITTED] gave evidence that the Council would have issued a stop work notice if there had been issues with the building work or if another person's licence number had not been provided.

### **Board's Conclusion and Reasoning**

- [30] The Board has decided that the Respondent **has not**:
- (a) 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); or
  - (a) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

and **should not** be disciplined.

[31] The reasons for the Board's decisions follow.

#### Record of Work

[32] 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>8</sup>.

[33] The evidence before the Board was that the Respondent did not carry out or supervise any restricted building work. He was not familiar with the building work being undertaken. He did not attend the site or inquire about the work as it progressed. In short, he had no involvement in it other than providing his Licensed Building Practitioner number to Mr [OMITTED] to allow the building work to continue.

[34] As the Respondent did not carry out or supervise any restricted building work, it follows that he was not required to provide a record of work.

[35] The fact that the Respondent allowed his licence to be used without any intention of carrying out or supervising the restricted building work is a matter for consideration under the charge of disrepute.

[36] The Board would take this opportunity to outline for both the Respondent and Mr [OMITTED] some of the relevant provisions as regards records of work that they should be aware of.

[37] Firstly, 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.*

[38] Section 85 of the Act makes it an offence punishable by a fine not exceeding \$50,000 for unlicensed persons to carry out or supervise restricted building work.

[39] The provisions were designed to ensure that persons who have been assessed as competent carry out restricted building work so as to avoid future instances of systemic failure in residential buildings.

[40] When restricted building work is carried out or supervised by a Licensed Building Practitioner then each and every LBP who carries out or supervises the work must provide a record of work on completion of that work. Failing to do so is a ground for discipline under the Act.

[41] 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

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<sup>8</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

*Ministry of Business Innovation and Employment v Bell*<sup>9</sup>, “... the only relevant precondition to the obligations of a licenced building practitioner under section 88 is that he/she has completed their work”.

- [42] Often, records of work are withheld for one reason or another. It can be a defence that there was a “good reason”. Being owed money is not a good reason. A record of work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [43] Neither is it a good reason that a record of work was not requested. The requirement is on the Licensed Building Practitioner to provide a record of work, not on the owner or territorial authority to demand one. They are required to act of their own accord and not wait for others to remind them of their obligations.

#### Disrepute

- [44] The Act does not provide any guidance on what sort of conduct will bring or is likely to bring the regime into disrepute. The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”,<sup>10</sup> and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>11</sup>, the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>12</sup>

- [45] As to what conduct will or will not be considered to bring the regime into disrepute, it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions<sup>13</sup>;
- honest mistakes without deliberate wrongdoing<sup>14</sup>;
- provision of false undertakings<sup>15</sup>; and
- conduct resulting in an unethical financial gain<sup>16</sup>.

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<sup>9</sup> [2018] NZHC 1662 at para 50

<sup>10</sup> Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

<sup>11</sup> [2012] NZCA 401

<sup>12</sup> [2012] NZAR 1071 page 1072

<sup>13</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>14</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>15</sup> *Slack, Re* [2012] NZLCDT 40

<sup>16</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [46] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics and cases that have been considered under them make it clear that unethical or unprofessional conduct can amount to disreputable conduct.
- [47] On 26 October 2021, a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022<sup>17</sup>. The conduct in this matter predated the Code. As such, it cannot be considered in light of it.
- [48] The conduct in this matter was the Respondent allowing his licence details to be used to enable restricted building work to be carried out without an intention to provide actual supervision for that restricted building work. As noted above with respect to records of work, such conduct can defeat the purposes of the licensing regime.
- [49] It was clear that the Respondent's provided his licence number and that it was used to enable Mr [OMITTED] to continue the build. Neither the Respondent nor Mr [OMITTED] turned their minds to what the implications of that were and, in this respect, the Respondent was ignorant of his obligations as a Licensed Building Practitioner. Ordinarily, this would be sufficient to find that the Respondent had brought the regime into disrepute as ignorance of the law is not a defence. Ignorance based on erroneous advice from an official can, however, be a defence and that is what occurred in this matter.
- [50] Reliance on official advice was upheld as a defence in *Wilson v Auckland City Council (No 1)*.<sup>18</sup> In that matter, the appellant was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police*<sup>19</sup> Holland J found that where a person committed a crime believing it to be lawful on the grounds of "officially induced error", it was in the public interest as well as being just that that person should not be held criminally liable.
- [51] The Board considers the directions given and the manner in which the issue of Mr [OMITTED]'s licence was managed by the Marlborough District Council led to the perception that the Respondent did not have to actually supervise the restricted building work. The impression given by the Council was that all that was needed was a licence number to bridge a gap in Mr [OMITTED]'s licensing. On that basis, the Board finds that the offence has not been committed.

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<sup>17</sup> Clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

<sup>18</sup> [2007] NZAR 705 (HC)

<sup>19</sup> (1994) 11 CRNZ 132

[52] The Board also took into consideration that the Respondent had not set out to deliberately defeat the licensing regime. There was no intention or aggravating features as regards his conduct. He unwittingly provided his licence number to help out a colleague. He has learnt from this. Given those factors, even if the Council directions noted had not been made, the conduct would not have reached the threshold required for the Board to make a disciplinary finding. In this respect, the courts have stated that the threshold for disciplinary complaints of disrepute is high, and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

*This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*

**Directions**

[53] The Board directs that a copy be sent to Mr [OMITTED] and the Marlborough District Council.

Signed and dated this 15<sup>th</sup> day of December 2022

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style with a long horizontal stroke extending to the right.

**Mr M Orange**  
Presiding Member