Before the Building Practitioners Board

	BPB Complaint No. CB25131
Licensed Building Practitioner:	Philip Whiting (the Respondent)
Licence Number:	BP 132285
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 Location	Auckland
Hearing Type:	In person
Hearing Date:	18 December 2019
Decision Date:	18 December 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
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.

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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 on multiple lots[2] at [omitted] Auckland. 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*[3] and in New Zealand in *Dentice v Valuers Registration Board*[4].

[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*[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."*

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[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[2] Lots 1 to 8
[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

[4] 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.*

[5] 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.

Procedure

[6] The matter was originally set down to be heard on the papers. The Board met on 15 August 2019 to consider the matter together with complaint number CB21529 and CB25130. At the on the papers hearing the Board decided that further evidence was required in order for the Board to make a decision. It decided that an in-person hearing was required. A direction was made that that matter be consolidated with CB25129 and CB25130. The Respondent in CB25130 did not agree to consolidation.

[7] Prior to the hearing the Complainant raised concerns about her safety if she was to attend and give evidence. A direction was issued that she could, if required as a witness, appear by phone.

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.

Evidence

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[7]. Under section 322 of the Act the Board has

[6] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200
[7] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[10] 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.

[11] The Respondent's company was engaged to undertake building work on new residential dwellings under building consents. The work included restricted building work for which a record of work is required.

[12] The building work in question was undertaken between June 2017 and August 2018. On 23 November 2018 the Complainant sought records of work. They were not provided. The Complainant made a complaint about three licensed building practitioners, including the Respondent, as a result of the failure to provide.

[13] The Respondent provided a response to the complaint. He stated that the other licensed building practitioners complained about did not have anything to do with signing off on the project.

[14] The Respondent noted that a request was made for records of work on 23 November 2018 and that he responded on 27 November 2018 to say that he was on leave. No further requests were made for paperwork.

[15] A record of work dated 7 March 2019 was provided by the Respondent. It recorded that he supervised restricted building work. He submitted that he had done nothing wrong.

[16] The Complainant made a further submission noting that repeated requests for a record of work were made and that records of work were only provided once a complaint had been made. The Complainant also noted that [omitted] was the on-site foreman and that the Respondent left his on-site responsibilities to him.

[17] At the hearing further evidence was heard as to how the build was managed and who carried out the restricted building work. In summary the evidence was that:

(a) the Respondent subcontracted the construction to [omitted] to carry out the build and that there was no formal contract in place with him for the provision of his services;

(b) the Respondent did not carry out or supervise any restricted building work.

(c) [Omitted] was the licensed building practitioner on site who was carrying out the build; and

(d) he provided [omitted] as a project manager to the build.

[18] The Respondent also gave evidence that he believed that a single record of work for all of the restricted building work could be provided by any licensed building practitioner associated with the work. He noted that, as a result of the complaint, he was now aware that this is not the case.

[19] The Board decided that further evidence from the Complainant was not required.

Board's Conclusion and Reasoning

[20] 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 be disciplined.

[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 work[8].

[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 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.

[24] The evidence before the Board was that the Respondent did not carry out or supervise any restricted building work.

[25] The Respondent did provide a record of work on the basis of a misguided belief that he could provide a record of work for all of the restricted building work carried out by all of the licensed building practitioners. As noted above the requirement is that each and every licensed building practitioner must provide their own record of work for the restricted building work that they carry out or supervise. This accords with 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.

[8] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[26] In effect the Respondent's record of work was a nullity. There are no disciplinary offences that relate to the provision of a false or misleading record of work. As such the Board can take the matter no further. The Respondent is, however, cautioned against such practices in the future.

[27] The Respondent is also cautioned as regards the nature and tone of his communications with clients. He should note that, in the past, the Board has upheld complaints under the ground of disrepute for seriously inappropriate communications.

Signed and dated this 26th day of February 2020

Chris Preston

Chris Preston
Presiding Member