

Before the Building Practitioners Board

	BPB Complaint No. CB25129
Licensed Building Practitioner:	Michael Witheford (the Respondent)
Licence Number:	BP 122527
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:	In Person
Hearing Date:	18 December 2019
Decision Date:	11 February 2020

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Rob Shao, LBP, Carpentry and 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 Regulations¹ to hold a hearing in relation to building work on multiple lots² 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*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.”

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 persons⁶:

... 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 CB21530 and CB25131. 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 CB25130 and CB25131. 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 committed⁷. 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] *[Omitted]*(CB25131) company was engaged to undertake building work on new residential dwellings under building consents. The work included restricted building work. A record of work is required from each and every licensed building practitioner who carries out or supervises restricted building work. It was alleged that the Respondent was one of the licensed building practitioners and that he had failed to provide his record of work.
- [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 noted that there was financial dispute and that records of work were being withheld pending payment of outstanding invoices.
- [14] The Respondent also stated that both he and another licensed building practitioner, *[Omitted]*, supervised but that *[Omitted]* was responsible for the submission of the record of work as he was paid to provide records of work for everything.
- [15] In a further response dated 11 July 2019 the Respondent clarified his role on the site noting that he moved into a managerial role and that *[Omitted]*, a licensed building practitioner, stepped in as the on-site licensed building practitioner.
- [16] The Complainant also provided submissions which noted that the Respondent was the site foreman but that his licence was suspended over the period 15 December 2017 to 6 September 2018. Detail on the Register of Licensed Building Practitioners confirms that the Respondent was suspended for failure to adhere to licensing requirements over that period.
- [17] The Board can investigate a licensed building practitioner's conduct provided they were, at the time of the alleged conduct, licensed. Section 315(2) of the Act
- A complaint or inquiry, and any decision on the complaint or inquiry, may relate to a person who is no longer a licensed building practitioner but who was a licensed building practitioner at the time of the relevant conduct.*
- [18] Under section 297(1) of the Act a licensed building practitioner ceases to be one during a period of suspension:

A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.

- [19] The building work took place over the period June 2017 to August 2018. The Respondent's licence was suspended from December 2017. As such the Board has jurisdiction over the period of the build that the Respondent was licensed being June 2017 to 15 December 2017.
- [20] 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) [Omitted](CB25131) was the owner of the business that had contracted to build the dwellings;
 - (b) [Omitted] was not supervising the onsite construction;
 - (c) [Omitted] (CB25130) was sub-contracted to carry out the build;
 - (d) the Respondent provided project management services which amount to coordination and oversight of the builds; and
 - (e) the Respondent did not carry out or supervise any restricted building work.
- [21] The Board also hear from [Omitted] 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.
- [22] The Board decided that further evidence from the Complainant was not required.

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] 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 work⁸.
- [25] 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.

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

- [26] 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.
- [27] The evidence before the Board was that, at the time when the Respondent was licensed, he did not carry out or supervise any restricted building work. This was notwithstanding the statement in his first response to the complaint had supervised the building work. What he had provided was project management, not supervision as per the definition of that term in section 7 of the Act and the associated regulatory provisions that apply to restricted building work.
- [28] It is also noted that *[Omitted]* was working under the 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.

Signed and dated this 11th day of February 2020



Chris Preston
Presiding Member