

## Before the Building Practitioners Board

	BPB Complaint No. CB25135
Licensed Building Practitioner:	Mohammed Hanif (the Respondent)
Licence Number:	BP 113799
Licence(s) Held:	Carpentry and Site AOP 1

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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	Wellington
Hearing Type:	On the Papers
Hearing Date:	8 October 2019
Decision Date:	26 November 2019

#### Board Members Present:

Chris Preston (Presiding)  
Richard Merrifield, LBP, Carpentry Site AOP 2  
Mel Orange, Legal Member  
David Fabish, LBP, Carpentry Site AOP 2  
Robin Dunlop, Retired Professional Engineer  
Bob Monteith, LBP Carpentry and Site AOP 2  
Faye Pearson-Green, LBP Design 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 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<sup>1</sup> 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

[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*<sup>4</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.”*

<sup>1</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

- [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.

### **Evidence**

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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 an addition and alteration to an existing dwelling under a building consent. The building work undertaken included restricted building work.
- [9] The building consent was issued on 30 June 2016 and a code compliance certificate on 25 January 2019 an application for the same having been made on 31 October 2018. The Respondent’s building work took place between 11 October 2017 and 13 October 2018. A record of work for the Respondent’s restricted building work dated 14 December 2018 was provided to the territorial authority on 19 December 2018. It was not provided to the owner at the same time.
- [10] A complaint dated 23 February 2019 was made by the Complainant about a number of matters. The Board, however, resolved to only further investigate, the allegation that the Respondent may have failed to provide a record of work to the owner on completion of restricted building work.

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[11] A summary of the relevant dates is:

Date	Event
30 June 2016	Building consent issued
11 October 2017	Building work starts
11 October 2018	Final inspection passed
13 October 2018	Building work finishes
2 November 2018	Code compliance certificate applied for
19 December 2018	Record of work provided to territorial authority
25 January 2019	Code compliance certificate issued
23 February 2019	Complaint made

### Board's Conclusion and Reasoning

- [12] 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.
- [13] There was no question that the Respondent had not carried out restricted building work nor that he had a duty to provide a record of work on completion of that restricted building work.
- [14] The question the Board needs to consider is whether, in providing the record of work to the territorial authority but not the owner, he had satisfied the requirements of section 88(1) of the Building Act. Consideration of this questions requires a review of the provisions of the Act.

### The building consent and code compliance certificate process

- [15] Restricted building work, by virtue of clause 5 of the Building (Definition of Restricted Building Work) Order 2011, includes
- (a) *the construction or alteration of—*
    - (i) *the primary structure of a house or a small-to-medium apartment building; or*

(ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*

- [16] Under section of section 401B of the Act the restricted building work provisions only apply to building work carried out under a building consent.
- [17] 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.
- [18] 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.
- [19] 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).*
- [20] 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.

#### Access to records

- [21] 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):*
- [22] Under section 216(3)(b) the information is to be kept at least for the life of the building to which the information relates.

[23] 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.

[24] 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.

Purposes of a record of work

[25] 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.

[26] 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.

[27] 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.

Consideration of the facts

[28] Looking at the present case a code compliance certificate was applied for and a record of work was subsequently provided to the territorial authority. 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.

[29] The remaining factor for the Board to consider is the timeliness of the provision of the record of work.

[30] 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 ...".

[31] Other jurisdictions such as those under the Plumbers, Drainlayers, and Gasfitters Act 2006 and the Electricity Act 1992 stipulate definitive time frames for the completion and provision of certification documentation by practitioners. The Building Act does not. Both section 88(1) and 317(1)(da)(ii) simply state "on completion". As such it is

open to the Board to interpret how soon after actual completion (bearing in mind the discussion on completion outlined above) the record of work must be provided.

- [32] On a literal interpretation the obligation to provide a record of work would be at the same time as completion. This would be impracticable and therefore cannot be the intended meaning. Time frames have not been specified and nor has Parliament chosen to use phrases such as “immediately on completion” or “as soon as reasonably practicable”. Given this and taking into consideration the requirement to give effect to the purpose of Parliament<sup>6</sup> the Board considers the use of the words “on completion” denotes a short time thereafter.
- [33] A degree of reasonableness has to be applied to this interpretation. Differing circumstances may result in longer or shorter timeframes. Generally, the prescribed form for a record of work is simple and straightforward and a licensed building practitioner ought to know what they have or have not done or supervised and as such there should be few impediments to it being completed and provided in short order. The situations where this is not the case will be rare and will have to be justified by the practitioner.
- [34] Turning again to the facts a record of work was provide some six weeks after a code compliance certificate was applied for and prior to a complaint being made about its non-provision to the owner. In such circumstances the Board finds that the delay was not unreasonable.

Signed and dated 26 November 2019



**Chris Preston**  
Presiding Member

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<sup>6</sup> Section 5 of the Interpretation Act 1999