IN THE DISTRICT COURT
AT AUCKLAND

CIV-2016-004-002182
[2017] NZDC 23847

UNDER	The Building Act 2004
IN THE MATTER OF	An appeal from a decision of the Licensed Building Practitioners Board
BETWEEN	JEFFREY BELL Appellant
AND	CHEN LU First Respondent
AND	MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Second Respondent
AND	REGISTRAR OF THE LICENSED BUILDING PRACTITIONERS BOARD Third Respondent

Hearing: 17 October 2017

Appearances: M R Taylor for the Appellant
No appearance by or on behalf of the First Respondent
M Urlich for the Second and Third Respondents

Judgment: 13 November 2017

JUDGMENT OF JUDGE B A GIBSON

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[1] The appellant is a licensed building practitioner in classes for carpentry and site, and was the subject of a complaint to the Licensed Building Practitioners Board brought by the first respondent. The complaint, which concerned alleged sub-standard and defective work by the appellant in the course of renovations to the first respondent's residential property in Blockhouse Bay, Auckland, was not substantiated before the Board but, by its written decision issued on 31 October 2016, the Board found the appellant had failed without good reason to provide a

record of work to the first respondent as owner and also to the relevant territorial authority as required by s 88(1) and (2) of the Building Act 2004 ("the Act"). The Board imposed a penalty of $500 on the appellant with respect to this failure and ordered him to pay $500 towards the costs of and incidental to the enquiry undertaken by the Board.

[2] An appeal was brought to the District Court pursuant to s 330(2) of the Act which enables the Court to hear an appeal against any decision of the Board taking action in terms of the disciplinary penalties referred to in s 318 of the Act.

[3] Mr Taylor, for the appellant, did not challenge the level of penalty, the appeal being on the basis that the registrar, who had been requested to provide a report to the Licensed Building Practitioners Board pursuant to Regulation 6 of the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008, ("the Regulations") had raised the issue of the failure to provide a record of work, when such failure was not the subject of the complaint to be reported on and so did not have authority to initiate an investigation into that matter thereby denying the Board the jurisdiction to determine that aspect of the matter before it.

[4] Mr Taylor argued the plain wording of s 88(1) only required the appellant to provide a record of work when the restricted building work in question had been completed, and that had not occurred at the time the first respondent unilaterally determined the building contract he had with the appellant. The appellant also argued that the work was exempt work pursuant to Schedule 1 of the Building Act 2004 and as such was not work required to be carried out pursuant to a building consent, which in turn meant it was not deemed to be restricted building work so that the obligations under s 88(1) and (2) of the Act did not apply.

The Building Act 2004

[5] The Building Act 2004 replaces the earlier Building Act 1991. It was enacted against a background of widespread public concern over the leaky building crisis and the activities of unqualified and inexperienced builders. It introduced a licensing regime for builders and a Board to ensure compliance on the part of builders with the

statutory requirements and with the building code which continued to remain in force. It is, as counsel for the second and third respondents said, an important piece of consumer legislation. Section 3 sets out the purposes of the Act with s 3(a) and (b) stating:

> This Act has the following purposes:
>
> (a) Provide for the regulation of building work, the establishment of a licensing scheme for building practitioners, and the setting of performance standards for buildings to ensure that –
>
> (i) People who use buildings can do so safely and without endangering their health; and
>
> (ii) Buildings are attributes that contribute appropriately to the health, physical independence and wellbeing of the people who use them; and
>
> (iii) People who use a building can escape from the building if it is on fire; and
>
> (iv) Buildings are designed, constructed, and able to be used in ways that promote sustainable development:
>
> (b) To promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[6] The regulatory regime and its purposes were described by Heath J in *Beattie v Licensed Building Practitioners Board and Whangarei District Council*[1] as follows:

> The purposes of licensing building practitioners are two-fold. Both have a consumer protection function. The first is to assess and record practitioners who have certain skills and knowledge. The second is to ensure that restricted building work is carried out or supervised by a licensed building practitioner. If a licensed practitioner is alleged to have carried out or supervised work other than in conformity with the standards required, he or she may be the subject of a complaint to the Board.

[7] Section 315(1) of the Act provides that any person may complain to the Board about the conduct of a licensed building practitioner.

[8] Section 316(1) of the Act provides that following the receipt of a complaint the Board is required to investigate it to determine whether or not to proceed with it. Grounds for disciplining a licensed building practitioner, pursuant to s 317(d)(a)(ii)

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[1] [2015] NZHC 1903 at para 4

include a failure to provide the owner and the relevant territorial authority with a record of work, on completion of the restricted building work, as required by s 88(1) and (2) of the Act.

[9] The Act makes it clear that the Board is required to act independently when conducting its hearing and s 322(2) of the Act provides that the hearing on a disciplinary matter is a judicial proceeding for the purposes of s 108 and 109 of the Crimes Act 1961, those provisions dealing with perjury, false oaths, or false statements.

[10] Any appeal to the District Court is by way of rehearing pursuant to s 335(2) of the Act.

Finding beyond the scope of the complaint – first ground of appeal

[11] The first respondent engaged the appellant to renovate a downstairs garage by transforming it into a living room and bedrooms. A building consent was applied for which covered this work as well as additional work, for which the appellant was not engaged, in the upstairs part of the house. The appellant was dismissed by the first respondent prior to the work he was undertaking being completed and a complaint from the first respondent was received by the Building Practitioners Board on 10 June 2015 with respect to that work. That complaint did not, as already mentioned, refer to the fact that the appellant had not provided the first respondent, as owner of the property, or the territorial authority, with a record of building work.

[12] The Board, having received a complaint, was required to investigate it and decide whether or not to proceed and to that end, pursuant to the Regulations it required the registrar to provide a report on the complaint. The registrar, by Regulation 7, is required to seek a response to the complaint from the licensed building practitioner.

[13] The role of the registrar in preparing a report to the Board on a complaint against a licensed building practitioner was discussed by Judge McElrea in *Beattie v*

Far North District Council[2] where, at para 28, he described the role as being largely a neutral one "*providing copies of the information from both sides and summarising for the Board the facts that are agreed and those in dispute*". Regulation 8(1)(c) also requires the registrar to indicate whether, in his view, Regulation 9 applies to the complaint, that regulation dealing with complaints not warranting further investigation.

[14] The Board has the ability, pursuant to s 317(1) of the Act, to initiate its own enquiry into a licensed building practitioner. Complaints by others are brought pursuant to s 315(1) of the Act. Mr Taylor's point was that this was not a Board initiated inquiry, but rather a complaint pursuant to s 315 so that the registrar's report ought to have been limited to the terms of the actual complaint and the matters set out in the regulations already referred to.

[15] There is a slight difference in procedure depending on the source of the complaint. For a Board-initiated inquiry the procedure set out in part 2 of the regulations is to apply, rather than the procedure set out in part 1 which is applicable to complaints under s 315 of the Act. The difference in procedure is, however, minimal in terms of the content of the registrar's report and simply reflects the ability of the Board to continue with an inquiry even if the complainant decides not to proceed with the complaint, but the Board, of its own motion, decides to do so.

[16] This matter began in the usual way with a complaint from Mr Lu and with the registrar, at the request of the Board, issuing a report pursuant to Regulation 6 of the Regulations. A hearing was scheduled but subsequently a building surveyor, Mr Light, who was assisting the appellant, wrote to the Board alleging procedural unfairness in the way the report had been compiled and seeking to have the Board proceed no further with the complaint by reconsidering its original decision to do so.

[17] Under Regulation 10, once the Board receives the registrar's report it must decide either to proceed no further with the complaint because Regulation 9 applies (where the complaint does not warrant further investigation) or proceed with the

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[2] CIV-2011-088-313

complaint. If it decides to proceed then Regulation 10(2) requires it to hold a hearing.

[18] The Board followed neither option but instead directed the complaint be considered afresh with a new registrar's report, and with that report disregarding the special advisor's report that had been obtained. Consequently there was then a second registrar's report which included the additional ground of discipline, namely the failure to provide a record of works, the only ground that succeeded at the hearing. That was not, however, a ground referred to in either Mr Lu's complaint or in the registrar's first report.

[19] Once the second report from the registrar was available Mr Light objected to the inclusion of the additional ground of complaint given that was not part of Mr Lu's complaint. The Board, in its written decision, in comments with which I agree, noted that the Complaints Regulations, while having to be complied with, were not to be seen as a straitjacket which the registrar or Board could not step out of, provided that what they do is in accordance with the provisions of the Act. The Board's view was that it was unreasonable to expect that complainants could identify all possible grounds of discipline saying, at para 44 of its decision:

> They do not have the same level of industry and/or regulatory knowledge to fully state what conduct of the licensed building practitioner ought to be investigated or to fully understand the ramifications of what has or has not been done as regards the building work. To require that a complainant be able to fully express all of the negligence, non-compliance or other matters that the Board should investigate in their complaint would be to require them to be an expert in the field or to engage one prior to making their complaint. This cannot have been the intention of Parliament. Rather the Board believed that it is enough that they express a ground of discipline and that the Board be able to then investigate to determine the extent of the possible disciplinary offending.

[20] These comments accord with ordinary practical common sense and a purposive approach to the interpretation of the requirement to investigate which is consistent with the purposes of the Act, in particular s 3(b) in ensuring that builders have responsibility for ensuring that building work complies with the building code and also the principles of the Act set out at s 4(2)(q) referring to the need to ensure that builders comply with the terms of building consents.

[21] Overall, therefore, I am satisfied that if in the course of investigating a complaint the registrar identifies other possible breaches of discipline then, provided those breaches are brought to the attention of the licensed building practitioner so he has the opportunity of answering them, there is nothing to prevent the Board from determining the further ground. Bringing the matter to the Board's attention is consistent with the registrar's role of assisting the Board in its investigative role; s 311(c) of the Act, and accordingly I can see no error of law in the Board's approach or any failure on its part by taking into account an irrelevant consideration in considering the record of work ground for disciplining the appellant.

Record of work: does it only arise when the restrictive building work has been completed?

[22] The appellant submitted that the obligation to provide a record of work only arose on completion of the restricted building work, relying on the plain words of s 88(1) of the Act, and given that at the time Mr Bell's contract was terminated the work was incomplete and another builder was, at that time, to be engaged, so that there was no obligation on the apellant's part to provide a record of work.

[23] The obligation of a licensed building practitioner to provide a record of work was recently considered in a decision of Judge Harrison, which was responsibly brought to my attention after the hearing by Ms Urlich, In *Ali v Kumar et al*[3] Judge Harrison, with reference to a holding of the Board in that case, said:

> [44] The board noted at [65] that there may be situations where a practitioner will not be involved in the work at its completion. It then said:
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> > The board has consistently held that in such circumstances, regardless of the reasons why the work cannot be completed, the licensed building practitioners restricted building work under the building consent will, in effect, have been completed as they will not be able to carry out any further restricted building work. To require otherwise would mean that a record of work would never be due and this would defeat the reason why records of work were brought into being.
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> [45] However, this analysis seems to overlook completely the provisions of s 87. That provides firstly that before restrictive work commences the owner must give the building consent authority the name of every licensed

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building practitioner who will be engaged in carrying out or supervising the restricted building work. Subsection (2) provides:

> After any restricted building work commences under a building consent, the owner must give the building consent authority a written notice if –
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> (a) a licensed building practitioner ceases to be engaged to carry out, or supervise, the restricted building work under the building consent; or
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> (b) another licensed building practitioner is engaged to carry out, or supervise, the restricted building work.

[48] The time frame is governed by s 87 which requires the owner to notify the building consent authority if the practitioner ceases to be engaged in respect of the work. The owner is obliged to notify the name of any new practitioner engaged. The building consent authority will then be in a position to demand, if necessary, a record of work to the point his engagement ceased in the event that the practitioner has not already done that of his own volition.

[24] Consistent with the view expressed in the decision in *Ali v Kumar*, as referred to in the preceding paragraph, the Board took the same approach in this present matter.

[25] Section 84 of the Act provides that all restricted building work must be carried out or supervised by a licensed building practitioner. The owner is, as Judge Harrison said in *Ali v Kumar et al* (supra) required, before the work commences, to give the building consent authority written notice of the name of every licensed building practitioner who is engaged to carry out or supervise the restricted building work under the building consent. From the record on appeal there seems to have been no evidence before the Board that the owner complied with this provision. Once the work has been carried out then the licensed building practitioner must, on completion of the restricted building work provide the owner and the territorial authority with details of the work.

[26] I agree with the Board that the record of work is useful historic knowledge for owners, both present and future, and for other parties who may come to be involved in cases alleging defective building practice. The Board's interpretation is that the word "completion" is limited to the work actually undertaken by the licensed building practitioner to the point at which the licensed building practitioner ceases to be involved in the project, rather than completion of the restricted building work, or in other words completion of the whole of the part of the project in which the

licensed building practitioner is involved. The appellant was unable to complete all of the restricted building work for which he was engaged because the first respondent terminated the contract he had with him, as he did with the builder subsequently engaged to complete the task. The Board relied on s 5 of the Interpretation Act 1999 to support its view of the wording of the section. Section 5(1) of that Act provides that the meaning of an enactment must be ascertained from its text and in light of its purpose. The word "enactment" means simply more than the "act" and is capable of referring to particular sections or parts of the act; *Wakefield Light Rail v Wakefield*[4].

[27] The purpose of ss 87 and 88 is to ensure that work for which a building consent is rrequired is carried out by a licensed building practitioner and the extent of that work made known to the owner and the territorial authority. Section 88(1) specifically refers to "*Each licensed building practitioner ... working on the project*" and so I agree with the Board that the obligation on the part of each licensed building practitioner under s 88(1) accrues once the practitioner has ceased to undertake work under the Building Consent, regardless of whether the work is in fact finished. Completion in those circumstances must mean when the licensed building practitioner completes his part of the work, whether that be brought about by the agreement being unilaterally terminated, or terminated by agreement prior to the anticipated end of the works, or at the end of the works. To construe it otherwise would place the obligation on the last licensed building practitioner working at the site to provide a record of his work, but with his predecessors exempt. That cannot be what Parliament intended and the only logical construction is the way the Board has interpreted the provision.

[28] However it is clear that s 88 of the Building Act 2004 cannot be seen in isolation from s 87 for the reasons set out in Judge Harrison's decision in *Ali v Kumar*. The owner must give the consent authority notice of the licensed building practitioner carrying out work in terms of the building consent. When that work is completed, either at the end of the project or at such point that the agreement is terminated, either unilaterally or by agreement, then the obligation passes to the builder to provide the record of work in the prescribed form.

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[4] [1906] 2 KB 143; [1907] 2 KB 256

[29] The difficulty here, however, as with *Ali v Kumar*, is that the Board had no evidence before it that Mr Lu, the first respondent had, in terms of s 87(2) given notice to the territorial authority that Mr Bell had ceased to be engaged to carry out the restricted building work and that another licensed building practitioner, in this case Mr P Norton was engaged to carry out the restricted building work. Mr Lu was required to give the notice as soon as practicable. Once that notice had been given then the obligation under s 88(1) to give the notice to the owner and the territorial authority fell on Mr Bell. Without Mr Lu giving notice under s 87(1) before the work commenced or s 87(2) once Mr Bell ceased to be engaged, the territorial authority had no notice that the requirement for a licensed building practitioner to carry out the work, in the form of Mr Bell's replacement, was being met.

[30] Accordingly, as those preconditions to liability were not established, I am of the view that Mr Bell was not obliged to supply a record of work and so the decision of the Board in that regard is quashed.

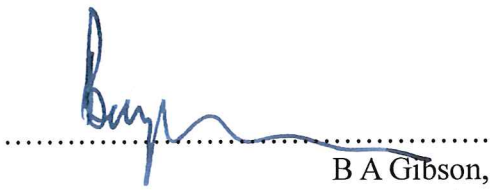
[31] The third point on appeal was that the work was not restricted building work so that a record of work need not have been given. Restricted building work is, pursuant to s 5 of the Building (Definition of Restricted Building Work) Order 2011, building work that is the construction or alteration of the primary structure of a house or small to medium apartment building. Section 5(3)(b) of the Order includes carpentry work. The appellant maintained that the work was exempt work which could have been done without a building consent pursuant to Schedule 1 of the Building Act 2004 and the fact that the work was performed under a building consent does not automatically mean the work covered by the consent is restricted building work.

[32] The Board's view was that once a building consent was obtained a record of work is required. Section 42A of the Act provides that a building consent is not required for building work in part 1 of Schedule 1. Restricted building work does require a consent but if the work was work for which a building consent was not in fact required because it fell within one of the exemptions in ss 41 and 42A of the Act, there was no obligation for a licensed building practitioner to supply the record of work which s 88(1) limits to restricted building work under a building consent.

The work does not become restricted building work because a consent was applied for and granted. It is only restricted building work if exemptions to obtaining a building consent do not apply.

[33] The Board, however, did not determine the issue of whether the work fell within Schedule 1 of the Act because its view was that it was irrelevant once a building consent for the work was issued and a licensed building practitioner was engaged to undertake the work. Had the appellant not succeeded on the issue of the requirement to provide the record of work, I would have referred that matter back to the Board for determination pursuant to s 337 of the Act.

[34] Accordingly, the appeal is allowed. Issues of costs can be raised by memoranda, the appellant's memorandum to be filed and served within 21 days of the date of this decision, and any reply on the part of the second and third respondents 21 days thereafter.



B A Gibson,
District Court Judge