

BPB Complaint No. C2-01319

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

AGAINST

Jeremy Read, Licensed Building Practitioner
No. BP 119979

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 3 December 2015 in respect of Jeremy Read, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted] Christchurch 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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 30 August 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- | | |
|----------------|-------------------|
| Chris Preston | Chair (Presiding) |
| Mel Orange | Board Member |
| Dianne Johnson | Board Member |
| Bob Monteith | Board Member |
- [6] The matter was considered by the Board in Nelson on 30 August 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The Board Secretary was present during the course of the hearing.
- [8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

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Board Procedure

- [9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 20 April 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- [11] On 12 May 2016 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent has 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).
- [12] On 8 June 2016 the Board sent the Respondent a Notice of Hearing outlining that the matter would be dealt with on the documents before the Board but that the Respondent could attend the hearing by telephone or video conference or in person at his own expense. On 25 August the Respondent advised he would attend by telephone.

Function of Disciplinary Action

- [13] The common understanding of the purposes 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 Kingdom¹.
- [14] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:
- Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*
- [15] It must also be noted that the Board has jurisdiction only with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

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

² [1992] 1 NZLR 720 at p 724

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The Hearing

- [16] The hearing commenced at 1.30 p.m.
- [17] The Respondent was telephoned and sworn in. He gave evidence and answered questions from the Board.

Substance of the Complaint

- [18] The allegation was that the Respondent failed to provide a record of work on completion of restricted building work.

Evidence

- [19] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*³ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [20] The building work undertaken involved earthquake repairs completed under a building consent. The Respondent was an employee of the main contractor.
- [21] Work commenced in December 2014 and was finished in June 2015. The main contractor went into liquidation in August 2015.
- [22] The Complainant pursued the Respondent for compliance documentation and alleged the Respondent would not provide documents until unpaid subcontractors were paid. The Complainant outlined that they had paid the main contractor these sums.
- [23] The Respondent provided a response to the complaint. He stated a record of work was signed and sent to the Christchurch City Council prior to the complaint being

³ [2009] 1 NZLR 1

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lodged. He rejected the allegation that he had told the Respondent or anyone else that he would not provide compliance documentation. A copy of a record of work dated 12 November 2015 was included with the response. He said the statement as regards payment was in relation to producer statements, not records of work.

- [24] The Christchurch City Council confirmed that a record of work was received on 13 November 2015.
- [25] Inquiries were made of the Complainant to ascertain whether a record of work had been received by him. He advised he had not received one.
- [26] At the hearing the Respondent accepted he did not send it to the owner but has since provided a record of work to the owner. He had sent it to the council. He thought that was enough. He stated that the complaint related to not providing producer statements and had nothing to do with records of work and that the only reluctance he had in relation to documentation was in relation to producer statements.

Board's Conclusion and Reasoning

- [27] There is a statutory requirement under s 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 work⁴.
- [28] Failing to provide a record of work is a ground for discipline under s 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.
- [29] The Board notes the Respondent disputes whether the Board has jurisdiction in respect of the complaint as it related to producer statements. The Board's jurisdiction is in relation to the conduct of the Respondent and as it is an inquiry process it is not necessary for the Complainant to make out the specific grounds of discipline. Rather it is for the Board to look at the conduct and to ascertain what grounds of discipline should be inquired into. In this instance the record of work matter has been identified and investigated.
- [30] The Board discussed issues with regard to records of work in its decision C2-01170⁵ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [31] Each and every licensed building practitioner who carries out restricted building work must provide a record of work. It must be provided to the owner and to the territorial authority. Not to just one or the other. The evidence before the Board was that only the territorial authority has received one so in this respect the Respondent has fallen short of the requirements of s 88 of the Act. The Board notes the Respondent's confusion as to the requirements of that Act and this is a matter it will take into account in mitigation when considering penalty
- [32] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in s 88(1) simply states "on completion of

⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁵ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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the restricted building work ...". The Board has interpreted this as a short time after completion.

- [33] The question here is whether the delay was reasonable. The evidence before the Board was that the Respondent's involvement ceased in June 2015. A record of work was provided to the territorial authority in mid November 2015. The Board finds that this is an unreasonable period of delay. Again the Board notes that the circumstances surrounding the liquidation and the Respondent's employment may have impacted on the delay but again this is a matter that goes to mitigation.
- [34] Finally s 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed.
- [35] Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [36] No reasons other than not being aware of the full requirements of the Act were put forward. Ignorance of the law is not an excuse and as such does not constitute a good reason.

Board Decision

- [37] The Board has decided that Respondent has 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.

Disciplinary Penalties

- [38] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Actⁱ.
- [39] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [40] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was the provision of the record of work to the council, the fact that it was not withheld for commercial or dispute reasons, the lack of understanding the requirements and the employment relationship with the liquidated business.
- [41] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on, the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there are further matters which the Board should take into consideration.

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[42] As stated earlier the purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct.

[43] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*⁶ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

[44] In all the circumstances the Board considers a censure is the appropriate penalty. Ordinarily the Board would impose a fine of \$1,000 in a case such as this but it has reduced this to a censure based on the mitigation outlined above.

Costs

[45] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[46] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*⁷ included the following:

"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."

[47] The judgment in *Macdonald v Professional Conduct Committee*⁸ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*⁹ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

⁷ HC, Wellington, AP23/94, 14 September 1995

⁸ HC, Auckland, CIV 2009-404-1516, 10 July 2009

⁹ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

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- [48] In *Collie v Nursing Council of New Zealand*¹⁰ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.

- [49] The Board consider the sum of \$500 is a reasonable sum toward the costs and expenses of, and incidental to, the inquiry by the Board. The amount of costs has been reduced on the basis that the matter was dealt with on the papers.

Publication of Name

- [50] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act.
- [51] The Board is also able, under s 318(5) of the Act, to order publication over and above the public register:

In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

- [52] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [53] The Board does not consider that any further publication is required.

Penalty, Costs and Publication Decision

- [54] For the reasons set out above, the Board directs that:

Penalty: Pursuant to s 318(1)(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the register and him being named in this decision.

¹⁰ [2001] NZAR 74

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Submissions on Penalty Costs and Publication

- [55] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 27 October 2016.
- [56] If no submissions are received then this decision will become final.
- [57] If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

- [58] The right to appeal Board decisions is provided for in s 330(2) of the Actⁱⁱ.

Signed and dated this 5th day of October 2016

Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ii **Section 330 Right of appeal**

- (2) A person may appeal to a District Court against any decision of the Board—
(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) within 20 working days after notice of the decision or action is communicated to the appellant; or
(b) within any further time that the appeal authority allows on application made before or after the period expires.