

Before the Building Practitioners Board

	BPB Complaint No. C2-01689
Licensed Building Practitioner:	Dion Field (the Respondent)
Licence Number:	BP 120905
Licence(s) Held:	Roofing AOP Concrete of Clay Tile Roof

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:	31 January 2018
Decision Date:	7 February 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

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** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	2
Evidence	3
Board’s Conclusion and Reasoning	4
Penalty, Costs and Publication	7
Penalty	7
Costs.....	7
Publication	8
Section 318 Order	9
Submissions on Penalty, Costs and Publication	9
Right of Appeal	9

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 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [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*⁴ Collins J. noted that:

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

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

“... 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.”

- [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 committed⁵. 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 complaint set out that the Respondent had carried out restricted building work in that he completed roofing work on a new residential dwelling under a building consent. The Complainant had requested a record of work from the Respondent but one was not provided. The Complainant noted that the Respondent’s roofing work was approximately 50% complete when the contractual relationship came to an end and that the Respondent had been paid for what he had done. Another licensed building practitioner completed the roof. The Complainant noted that he contacted the Building Consent Authority prior to engaging another licensed building practitioner to enquire as to whether this was allowed. He was advised that it was.
- [7] The Complainant noted a history of having difficulty getting records of work from the Respondent.
- [8] As part of the investigation process into the complaint on 3 July 2017 the Respondent sent the Registrar a copy of a record of work for the dwelling. The record of work did not record whether the Respondent had carried out or supervised the restricted building work that had been identified in it. The Respondent claimed the original email requesting the record of work had been deleted.
- [9] The Respondent provided a further email response noting that the terms and conditions of contract required full payment before the issue of producer statements, that there were issues with the compliance of building work on site and that he refused to complete the roof until those issues were addressed.
- [10] On 24 July 2017 a corrected record of work was sent to the Registrar.
- [11] Council records showed that it had not been provided with a record of work.
- [12] The hearing was originally set down to be heard on the papers. The Respondent sought an in person hearing. This was granted. Prior to the hearing he provided written submissions. Included were the following submissions:

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Our practice of submitting an LBP to our client it as the completion of the installation.

At no time I was aware that someone else was going to put the roof on or that council has cleared the job to go ahead. I found out through doing a drive by that someone else had installed the roof using all my product that I have paid for.

Ashok never contacted me at any stage to say that the job had been passed by the council, if he had done so and shown me papers that council had passed inspection I would have been more than happy to finish the lower roof as I had already started battening the lower roof.

[13] The submissions also provided background to the Complaint as well as details of a commercial disputes and compliance matters.

[14] The Respondent's submissions also set out:

At no point during my time of holding my LBP has it been mentioned that we cannot withhold and LBP until payment is completed. We therefore installed this into our 'Terms and Conditions' which he knew about and was quite willing to sign, which he did.

In most cases we do not issue our LBP until it is requested as we found that we were sending two or three copies and it was brought to our attention how easy it was to alter details and use on other builds.

I was also not aware that you would give an LBP on a part completed job and if this is the case the contractor that completed the lower roof is incorrect as I cut in the battens ready for installing underlay but because of the variation in the trusses, up to 50mm in places, I stopped.

[15] At the hearing the Respondent gave evidence that the drive by where he ascertained that the roof was complete was some two weeks after a meeting with the Building Consent Authority which took place on 4 November 2016.

[16] The Respondent spoke to his submissions and gave further background on the contractual and compliance issues. He was also questioned as regards to his understanding of his obligations with regards to records of work and how he maintains his competency. The Respondent stated he does not do all of the compulsory reading mandated for continued professional development and that he considered, once licenced, that he could just continue to operate as he did prior to licensing.

Board's Conclusion and Reasoning

[17] The Board has decided 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) and should be disciplined.

- [18] 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 work⁶.
- [19] 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.
- [20] The Board discussed issues with regard to records of work in its decision C2-01170⁷ 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, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [21] 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.
- [22] 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 ...”.
- [23] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. In others intervening events disrupt the normal flow as has occurred here. The Respondent suspended building work and, on his evidence, unbeknownst to him, another contracted completed the restricted building work.
- [24] In recent District Court decisions⁸ it has been held that where there is a change in licensed building practitioner during a build there is an obligation on the owner under section 87 of the Act to notify the Territorial Authority of a change of licensed building practitioner and that this can be taken into account when considering whether there the requirement for a record of work from the former or original licensed building practitioner has been triggered. In those cases there were commercial disputes, building work in question had not been completed and there

⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁸ *Ali v Kumar et al* [2017] NZDC 23582 and *Bell v MBIE et al* [2017] NZDC 23847

was a possibility that the original licensed building practitioner might return to carry out further building work.

- [25] Similar facts apply in this case except that the Respondent, on his own evidence, became aware that the roof had been completed and that, as a result, he would not be completing it in late November 2016 or early December 2016. As such, even if the approach in *Ali* or *Bell* was taken, the point had in time had then arrived when the Respondent knew or ought to have known that his restricted building work was complete and that a record of work was due.
- [26] A record of work was not provided till 24 July 2017 and only after a complaint had been made. When it was provided it was given to the Registrar and not to the persons stipulated in section 88 of the Act. Putting that aside and taking into consideration the date on which the Respondent became aware that the job had been completed and the date the record of work was finally provided the Board finds that the record of work has not been provided on completion and that the disciplinary offence has been committed.
- [27] Section 317(1)(da)(ii) of the Act does provide for a defence of the licenced 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. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [28] The Respondent has variously submitted that his terms and conditions allowed for documentation to be retained till he was paid and that he there has not been any information issued that this is not an acceptable practice.
- [29] The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. This has been the subject of numerous articles aimed at licensed building practitioners. Moreover compulsory reading as part of licensed building practitioner continuous professional development has been issued on this very matter. Given this the Respondent should now be aware of his obligations and that a record of work cannot be withheld for contractual reasons irrespective of his terms and conditions.
- [30] The Respondent has also noted that a request for a record of work had been deleted and, by implication, that he was not aware that a record of work had been requested. This was at variance with what was outlined in the Complaint and the efforts the Complainant stated he had made to get a record of work. Regardless the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations.
- [31] On the basis of the above no good reason is found.

Penalty, Costs and Publication

- [32] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [33] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [34] 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. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*⁹ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[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.

- [35] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁰ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [36] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500. The Board accepts that there is significant mitigation and it considered a censure. It noted, however, that the Respondent was lacking in his regulatory knowledge and ignorant as to his obligations around records of work and, as such, it will order a fine but will reduce the amount to \$500.

Costs

- [37] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [38] 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

⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁰ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹¹.

- [39] In *Collie v Nursing Council of New Zealand*¹² 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.

- [40] The Board notes the matter was to be dealt with on the papers. Ordinarily costs are reduced when the matter is dealt with in that manner. The Respondent required a hearing and as such overall costs have been increased.

- [41] The Board's normal starting point for a straight forward hearing is \$2,000. The matter was not overly complex and as such the Board has reduced the amount to \$1,000 being an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board

Publication

- [42] 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 Act¹³. The Board is also able, under section 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.

- [43] 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.

- [44] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁵. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁶. The High Court provided

¹¹ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

¹² [2001] NZAR 74

¹³ Refer sections 298, 299 and 301 of the Act

¹⁴ Section 14 of the Act

¹⁵ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁷.

- [45] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest¹⁸. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [46] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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 section 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 the Respondent being named in this decision.

- [48] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

- [49] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **1 March 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. 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.

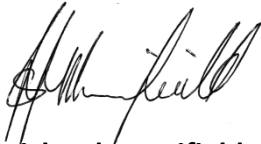
Right of Appeal

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

¹⁷ *ibid*

¹⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Signed and dated this 7th day of February 2018



Richard Merrifield
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.*