Before the Building Practitioners Board

	BPB Complaint No. C2-01794
Licensed Building Practitioner:	Andrew Stewart (the Respondent)
Licence Number:	BP 101981
Licence(s) Held:	Carpentry

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	Hamilton
Hearing Type:	In Person
Hearing Date:	30 May 2018
Decision Date:	18 June 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 3
Penalty, Costs and Publication 5
Penalty 5
Costs 6
Publication 6
Section 318 Order 7
Submissions on Penalty, Costs and Publication 8
Right of Appeal 8

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[1] 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 committed[5]. 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 was engaged to build a new residential dwelling under a building consent. The Building work included restricted building work, it commenced in April 2014. The Complainant alleged the Respondent's involvement in the build came to an end in December 2014. The build was completed by another builder. The Respondent failed to provide a record of work. The Complainant noted that there was a commercial dispute about payment for extras claimed.

[7] The Respondent provided a written response. He noted that issues arose during the build and that communications with the Complainant were difficult. The Respondent outlined the issues but did not respond to the allegation that he had not provided a record of work.

[8] The matter was set down to be heard on the papers. The Complainant sought the opportunity to be heard and provided further submissions. The Respondent provided a response to the submissions and also sought the opportunity to be heard.

[9] The submissions received dealt, in the main, with issues outside of the scope of the hearing. The Respondent's submissions did note that external columns had yet to be completed and that a front door had to be refitted and that he expected to be called back to complete those items.

[10] Both the Complainant and the Respondent were called by telephone conference. The Complainant confirmed that a record of work had still not been provided. The Respondent stated it had not been provided as he had not been paid. He did state that he would, having been advised as to his obligations, provide a record of work.

Board's Conclusion and Reasoning

[11] 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

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

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.

[12] 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 work[6].

[13] 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.

[14] The Board discussed issues with regard to records of work in its decision C2-01170[7] 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.

[15] 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.

[16] 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 …".

[17] 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. Completion occurred in or about December 2014. A record of work has still not been provided.

[18] The Respondent has alluded to the restricted building work not being complete. It is not clear whether the outstanding items were restricted building work or not but given the lapse of time the expectation that the Respondent would be called back to complete further work is not reasonable.

[19] On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[20] Section 317(1)(da)(ii) of the Act provides 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

[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

case will be decided by the Board on its own merits but the threshold for a good reason is high.

[21] In this instance there was an ongoing payment dispute. 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. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.

Penalty, Costs and Publication

[22] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[23] The matter was dealt with at a hearing. Included in the evidence was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[24] 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*[8] 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.*

[25] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[9] 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.

[26] Record of work matters are at the lower end of the disciplinary scale. The original offending occurred in 2014 and as such the penalty needs to be consistent with Board penalties being imposed at the time. In 2014 the Board was being more lenient as records of work were somewhat new. The Board's starting point then was a fine of $1,000.

[8] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[9] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[27] The aggravating features in the case are that there has been a significant period of time over which the record of work has not been provided and that it was withheld for commercial leverage.

[28] The Board did indicate to the Respondent that if he provided a record of work within five (5) working days of the hearing then this would be taken into consideration as mitigation. The Respondent has done so.

[29] On the basis of the above the Board finds that a fine of $500 is the appropriate penalty.

Costs

[30] 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."

[31] 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[10].

[32] In *Collie v Nursing Council of New Zealand*[11] 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.*

[33] The Board notes the matter was to be dealt with on the papers. Ordinarily costs for a hearing would be in the order of $1,000 but the Board reduces this to $500 when the matters is dealt with on the papers. The hearing in this instance was only necessitated by the Complainant's additional submissions. As such the Board still considers the amount of $500 in costs is an appropriate amount for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[34] 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[12]. 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.*

---

[10] *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.

[11] [2001] NZAR 74

[12] Refer sections 298, 299 and 301 of the Act

[35] 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.

[36] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[13]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[14]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[15]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[16].

[37] 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 interest[17]. 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.

[38] Based on the above the Board will not order further publication.

Section 318 Order

[39] 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 $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 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.**

[40] 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.

[13] Section 14 of the Act
[14] Refer sections 200 and 202 of the Criminal Procedure Act
[15] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[16] ibid
[17] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

[41] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **10 July 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

[42] The right to appeal Board decisions is provided for in section 330(2) of the Act[ii].

Signed and dated this 18th day of June 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.