

Before the Building Practitioners Board

BPB Complaint No. CB25866

Licensed Building Practitioner:

Matson Broederlow (the Respondent)

Licence Number:

BP 107646

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 Type:

On the Papers

Hearing and Draft Decision Date:

3 March 2022

Final Decision Date:

2 May 2022

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, LBP, Carpentry and Site 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.

Draft Disciplinary Finding:

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

The Respondent **has not** committed a disciplinary offence under section 317(1)(i) of the Act.

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Summary of the Board's Draft Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,000 and ordered to pay costs of \$500. The disciplinary outcome will be recorded on the Register of Licensed Building Practitioners for a period of three years.
- [2] The allegation that the Respondent conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute did not meet the threshold for the matter to be dealt with as a disciplinary offence.

The Charges

- [3] On 3 March 2022, the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.
- [4] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [5] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Regulation 9 Decisions

- [6] The complaint to the Board contained allegations that the Respondent had conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [7] These allegations related to failures to provide documentation, failure to co-operate and a breach of contract.
- [8] With regard to those allegations, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (f) *the investigation of it is—*
- (ii) *unnecessary;*

- [9] The Courts have stated that the threshold for disciplinary complaints of disrepute is high. The Board notes that when the disciplinary provision was introduced to Parliament, the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

- [10] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111¹ and discussed the legal principles that apply.
- [11] The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”,² and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*³ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*⁴
- [12] As to what conduct will or will not be considered to bring the regime into disrepute, it will be for the Board to determine on the facts of each case. The Board will, however, be guided by findings in other occupational regimes. In this respect, it is noted disrepute was upheld in circumstances involving:

¹ Board decision dated 2 July 2015.

² Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

³ [2012] NZCA 401

⁴ [2012] NZAR 1071 page 1072

- criminal convictions⁵;
- honest mistakes without deliberate wrongdoing⁶;
- provision of false undertakings⁷; and
- conduct resulting in an unethical financial gain⁸.

- [13] In this instance the conduct complained about concerned contractual issues.
- [14] It is on the basis of the above matters, and the facts as presented in the complaint and response, that the Board has decided that the matters raised did not reach the seriousness threshold as outlined in the above court decisions.

Disciplinary Offence to be Investigated

- [15] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had 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).
- [16] Under regulation 10, the Board is required to hold a hearing in respect of that matter

Draft Decision Process

- [17] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures⁹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation¹⁰. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [18] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [19] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

⁵ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

⁶ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

⁷ *Slack, Re* [2012] NZLCDT 40

⁸ *Collie v Nursing Council of New Zealand* [2000] NZAR 7

⁹ Clause 27 of Schedule 3

¹⁰ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

Function of Disciplinary Action

- [20] 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*¹¹ and in New Zealand in *Dentice v Valuers Registration Board*¹².
- [21] 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*,¹³ 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.”*

Evidence

- [22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed¹⁴. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [23] The Respondent was engaged to carry out building work on a residential building at [Omitted] under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Complainant stated that the Respondent's building work started on or about May 2015 and came to an end on or about December 2015. The Respondent said the project ran from June 2015 to February 2016.
- [24] The building work undertaken was an extension and alteration which included changes to the roof form, internal layout including roofing, cladding and foundation work.
- [25] The Respondent attended a final council inspection on 15 December 2016, which resulted in a Fail. On 17 January 2018 a second final council inspection was attended by the Respondent's administrator which resulted in a Pass/may proceed to CCC.
- [26] The Respondent acted as agent for the Code Compliance Certificate application dated 3 August 2016 received by the council 15 March 2018. On the application submitted the Respondent was listed as the Licensed Building Practitioner who carried out or supervised foundation work, building work and head contractor/site manager and therefore would be providing a Record of Work.
- [27] The Respondent received a Code Compliance Certificate request for further information letter from the Council dated 23 March 2018. The letter listed several items required to complete the application including Records of Works (ROW) for roof, beams and lintels,

¹¹ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

¹² [1992] 1 NZLR 720 at p 724

¹³ [2016] HZHC 2276 at para 164

¹⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

bracing, damp proofing, ventilation system, wall cladding system, tanking membrane, door and window installation.

- [28] Correspondence between the Complainant and Council dated 16 June 2020 refer to a CCC RFI refusal letter that was sent to the Respondent 23 October 2018.
- [29] The Complainant had made numerous attempts to obtain a record of work and other documents for the purposes of obtaining the Code Compliance Certificate.
- [30] The Respondent stated that he oversaw the company's operations but that another Licensed Building Practitioner supervised the project and provided a record of work dated 10 August 2016. This record of work is on the Council file.
- [31] The Board notes that the Licensed Building Practitioner who has provided a record of work was not licensed at the time of the project.
- [32] The Respondent is listed as the Licensed Building Practitioner for the project on the following building inspection reports - foundations dated 8 July 2015, framing dated 29 July 2015, cavity wrap dated 4 August 2015 and site inspection dated 14 August 2015. He is also listed on the application for the code compliance certificate.
- [33] The Respondent is listed as present on site on the following building inspection reports - framing dated 22 July and 11 August 2015, and preline dated 21 and 28 August 2015.

Draft Conclusion and Reasoning

- [34] 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.
- [35] 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 work¹⁵.
- [36] 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.
- [37] The Board discussed issues with regard to records of work in its decision C2-01170¹⁶ 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 Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁶ Licensed Building Practitioners Board Case Decision C2-01170 15 December 2015

- [38] The provision of a record of work by a person who was not at the relevant time a Licensed Building practitioner is not acceptable. On the basis of the evidence outlined above the Respondent was on site and is recorded as the Licensed Building Practitioner on the project. As such it was his responsibility to complete the record of work for the restricted building work he carried out and/or supervised.
- [39] 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.
- [40] 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 ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁷ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [41] As to when completion will have occurred is a question of fact in each case.
- [42] 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 on the Complainant’s evidence in December 2015 and even on the Respondent’s own evidence by February 2016. A record of work has not been provided by the Respondent. When the Council file was obtained on 11 November 2021 there was no record of work for the Respondent on the file. 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.
- [43] 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 case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [44] 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.
- [45] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

¹⁷ [2018] NZHC 1662 at para 50

- [46] The Record of Work provided by the other (now) Licensed Building Practitioner does not meet the statutory obligation nor remove the Respondent's statutory obligation to provide one.
- [47] Accordingly, the Board finds that no "good reason" has been established.

Draft Decision on Penalty, Costs and Publication

- [48] 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.
- [49] The matter was dealt with on the papers. Included 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

- [50] 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*¹⁸ 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.

- [51] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁹ 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [52] 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, an amount which it considers will deter others from such behaviour. The Board was, in 2015, being more lenient and the Board has decided to impose a penalty on the basis of its tariffs at that time. There are no other aggravating nor mitigating factors present. As such, the Board sets the fine at \$1,000.

Costs

- [53] 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."

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [54] 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 case²⁰.
- [55] In *Collie v Nursing Council of New Zealand*,²¹ 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.*
- [56] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [57] 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 Act²². 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.*
- [58] 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.
- [59] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. The High Court provided guidance as to the types of

²⁰ *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.

²¹ [2001] NZAR 74

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁶.

- [60] 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 interest²⁷. 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.
- [61] Based on the above, the Board **will not** order further publication.

Draft Section 318 Order

- [62] 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 \$1,000.
 - 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(l)(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.

- [63] 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 Draft Decision

- [64] The Board invites the Respondent to:
 - (a) provide further evidence for the Board to consider; and/or
 - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [65] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **Friday 29 April 2022**.
- [66] If submissions are received, then the Board will meet and consider those submissions.
- [67] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [68] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

²⁶ ibid

²⁷ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Request for In-Person Hearing

- [69] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [70] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **Friday 29 April 2022**.
- [71] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

Signed and dated this 6th day of April 2022.



Mr C Preston
Presiding Member

This decision and the order herein were made final on 2 May 2022 on the basis that no further submissions were received.

Signed and dated this 5th day of May 2022.



Mr C 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;*

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- (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.*