

## Before the Building Practitioners Board

	BPB Complaint No. C2-01685
Licensed Building Practitioner:	Lidong Xie (the Respondent)
Licence Number:	BP 119352
Licence(s) Held:	Foundations AOP Concrete or Timber Pile Foundation; Walls and Concrete Slab-on-Ground

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person – Consolidated with C2-01680 and C2-01684
Hearing Date:	20 February 2018
Decision Date:	20 March 2018
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	Robin Dunlop, Retired Professional Engineer
	Bob Monteith, 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.

#### Board Decision:

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

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## 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<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) 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
  - (b) 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).

## 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

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

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

- [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*<sup>4</sup> 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.”*

- [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.

### **Background to the Complaint**

- [5] The Board received related complaints regarding the failure to provide records of work on the completion of restricted building work. The Board noted, on the basis of the evidence before it when considering the Registrar’s Report, that the Licensed Building Practitioners may have colluded and that such behaviour may have brought the regime into disrepute.

### **Evidence**

- [6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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.

- [7] The Board heard evidence from:

Lidong Xie	Respondent
Yong Zhang	Respondent in C2-01680

- [8] [Omitted], a former Licensed Building Practitioner whose licence was suspended as a result of disciplinary action, was the main contractor for the build. He engaged the services of Yong Zhang to manage the project for him. He in turn utilised his subcontractors including the Respondent to carry out the building work.

- [9] The Respondent, who had worked for Yong Zhang in the past, carried out and completed foundations on the new build project. The work started in March 2016 and was completed soon thereafter.

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

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [10] The Complainant alleged that the Respondent withheld the record of work as a result of payments not being made to the Respondent by [Omitted]. The Complainant further alleged that the Respondent and Yong Zhang acted in concert to withhold the record of work so as to elicit outstanding sums from the Complainant.
- [11] The Respondent provided a written response to the Complaint. In it he noted that in May 2017 he broke his leg and was undergoing treatment thereafter and that this was why he could not provide a record of work. Evidence to support this was submitted.
- [12] A record of work was eventually provided in July 2017.
- [13] At the hearing the Respondent stated that he did not know who the owner was and as such could not provide the record of work to the owner. He stated that he tried to meet with [Omitted] 10 times to provide him with a record of work but that [Omitted] would not meet. When asked why he did not post it he stated that he did not know [Omitted] or the owners address. He stated he emailed invoices and was not able to provide a reason as to why he had not emailed the record of work. He also noted that the owner lived next door to the development.
- [14] The Respondent accepted that the owner had contacted him directly requesting a record of work. He stated he did not then provide a record of work directly to the owner as he was not sure if the person who had contacted him was actually the owner. He made no enquiries as to whether the person who had contacted was or was not the owner.
- [15] The Respondent did not provide a record of work to the territorial authority. He stated that it was [Omitted] job to provide it to the territorial authority. He also stated that he only provides a record of work when the whole of the job is finished and then it is to the main contractor.
- [16] The Respondent stated he did not provide the record of work to Yong Zhang.
- [17] Yong Zhang stated he did not receive a record of work from the Respondent and did not discuss withholding a record of work with the Respondent. He stated that communications from him to the Complainant have been taken out of context.
- [18] When further questioned the Respondent stated that he had been paid for the job to which the Complaint relates but that he was owed money by [Omitted] for another foundation in the same development. It was after payment for this later job had not been made that he tried to make contact with [Omitted].

### **Board's Conclusion and Reasoning**

- [19] 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.

- [20] The Board has also decided that the Respondent **has not** 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).

#### Record of Work

- [21] 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<sup>6</sup>.
- [22] 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.
- [23] The Board discussed issues with regard to records of work in its decision C2-01170<sup>7</sup> 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.
- [24] 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.
- [25] 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 ...”.
- [26] 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 April 2016. A record of work was not provided until July 2017. 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. The Respondent’s efforts to provide a record of work to the main contractor were far too late and were directed at the wrong person.
- [27] The Respondent should note that the responsibility to provide a record of work to the owner and the territorial authority lies with the Respondent, not the main contractor. Whilst it may be pragmatic to provide it to the main contractor the

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<sup>6</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>7</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

Respondent runs the risk that he will face disciplinary action if the main contractor does not then pass it on to the persons who are entitled to it.

- [28] 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.
- [29] In this instance the Respondent has alluded to an injury. The injury in question did not occur till over a year after completion occurred and as such was not a good reason. Moreover even if the injury had been at about the same time as the record of work was due it a broken leg would not have prevented the Respondent from completing a record of work.

### Disrepute

- [30] 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 C2-01111<sup>8</sup> and discussed the legal principles that apply.
- [31] The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"<sup>9</sup> and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>10</sup> 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.*<sup>11</sup>
- [32] 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 finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:
- criminal convictions<sup>12</sup>;
  - honest mistakes without deliberate wrongdoing<sup>13</sup>;

<sup>8</sup> Board decision dated 2 July 2015.

<sup>9</sup> 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

<sup>10</sup> [2012] NZCA 401

<sup>11</sup> [2012] NZAR 1071 page 1072

<sup>12</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>13</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

- provision of false undertakings<sup>14</sup>; and
- conduct resulting in an unethical financial gain<sup>15</sup>.

[33] The allegation that the Board considered in relation to disrepute was possible collusion between licenced building practitioners to withhold records of work. The Board found that there was insufficient evidence before it to substantiate the allegation.

### **Penalty, Costs and Publication**

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

[35] 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

[36] 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*<sup>16</sup> 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.*

[37] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>17</sup> 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.

[38] 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.

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<sup>14</sup> *Slack, Re* [2012] NZLCDT 40

<sup>15</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

<sup>16</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>17</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

There are no aggravating nor mitigating factors and as such the fine will remain at \$1,500.

### Costs

- [39] 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.”
- [40] 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<sup>18</sup>.
- [41] In *Collie v Nursing Council of New Zealand*<sup>19</sup> 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.*
- [42] The Board notes the matter was dealt with at a hearing but that only the charge relating to a record of work was upheld and that the hearing was, with the consent of the Respondent, consolidated with other matters. Ordinarily costs for a hearing would be in the order of \$1,000 but the Board has reduced this to \$500 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

- [43] 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<sup>20</sup>. 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.*
- [44] 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.

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<sup>18</sup> *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.

<sup>19</sup> [2001] NZAR 74

<sup>20</sup> Refer sections 298, 299 and 301 of the Act



- [45] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>21</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>22</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>23</sup>. 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*<sup>24</sup>.
- [46] 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<sup>25</sup>. 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.
- [47] Based on the above the Board will not order further publication.

### Section 318 Order

- [48] 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 \$1,500.

**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.**

- [49] 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

- [50] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **13 April 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

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<sup>21</sup> Section 14 of the Act

<sup>22</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>23</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>24</sup> *ibid*

<sup>25</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

those submissions prior to coming to a final decision on penalty, costs and publication.

### **Right of Appeal**

[51] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 20<sup>th</sup> day of March 2018



**Chris Preston**  
Presiding Member

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#### <sup>i</sup> **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."*

#### <sup>ii</sup> **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**

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*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.*