

Before the Building Practitioners Board

	BPB Complaint No. C2-01720
Licensed Building Practitioner:	Zi Xiang Lin also known as Jiew Chong (the Respondent)
Licence Number:	BP 128223
Licence(s) Held:	Bricklaying and Blocklaying AOP Veneer

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:	Board Inquiry
Hearing Location:	Hamilton
Hearing Type:	On the Papers
Hearing Date:	1 February 2018
Decision Date:	8 March 2018
Board Members Present:	Chris Preston (Presiding) Mel Orange, Legal Member Catherine Taylor 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 disciplinary offences under sections 317(1)(a), 317(1)(e) and 317(1)(i) of the Act.

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Introduction

[1] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work;
- (b) has, for the purpose of becoming licensed himself or herself, or for the purpose of any other person becoming licensed (s 317(1)(e) of the Act):
 - (i) either orally or in writing, made any declaration or representation, knowing it to be false or misleading in a material particular; or
 - (ii) produced to the Registrar or made use of any document, knowing it to contain a declaration or representation referred to in subparagraph (i);
or

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

- (iii) produced to the Registrar or made use of any document, knowing that it was not genuine; and
- (c) 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 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.

Evidence

- [3] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [4] The Board set the matter down to be heard in Hamilton. The Respondent, who had been given notice of the hearing did not appear or seek an adjournment. Given the overall circumstances of the case the matter proceeded on the papers.
- [5] The Respondent was charged with and pleaded guilty to a charge under section 142(1)(d)(i) Immigration Act 1987 that he produced the passport in a name of a different person as relating to himself when in fact to his knowledge it related to some other person.
- [6] The Board was provided with the District Court sentencing notes in respect of the criminal charges the Respondent pleaded guilty to. The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel which can create a legal bar to asserting a particular position. An estoppel can arise from a previous determination of the matter by a court⁵. The Board considers, in this case, that estoppel applies as regards the District Court sentencing. As such the Board need not make further inquiry with regard to the facts.
- [7] The Sentencing Notes variously set out that:

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

⁵ Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

- [7] ... Mr Lin is a 49 year old Chinese national who has been living unlawfully in New Zealand since 2005.
- [8] ... Mr Lin, had in his possession a licensed builder's practitioner's ID card and a New Zealand driver's licence in the name of Jiew Min Chong. That is the name that was in the passport that is the subject of the charge.
- [9] These name details and the date of birth came back to a Hong Kong identity which Hong Kong Immigration subsequently determined did not exist in their records. ... As there was then a subsequent interview he confirmed his real name and admitted entering New Zealand in 2005 using a false passport.
- [12] An initial examination of this passport by Immigration New Zealand document examiners clearly shows the passport to have been altered on the identity page.
- [23] The Crown argues that there are a number of aggravating features to this offending. They include the fact that Mr Lin has been living unlawfully in New Zealand since 2005 and that he has used a false identity to obtain further false identity documentation in the form of the Building Practitioner's identity card and a New Zealand driver's licence.
- [32] Having reviewed the various decisions it would seem to me that there is a clear line of guidance that is apparent from the decisions that have been indicated that would set the starting point for offending of this nature at between two and a half and three years.
- [34] In my view this has been a serious and blatant example of gaining access to the country illegally using a forged passport. ... The passport had the wrong name. That would have been painfully and immediately obvious to Mr Lin. He has pleaded guilty to a charge that has those elements and he has knowingly used a false passport which he knows was forged for the purposes of gaining access to the country illegally.
- [36] ... It is relevant that he used that document to gain further documents for identity purposes such as the driver's licence and the builder's ID. He was thereby perpetuating the initial fraud.
- [38] This has been in my assessment a blatant example of a challenge to the integrity of the New Zealand immigration system. A breach of the honesty obligations to Immigration New Zealand are an affront to all those who pursue legitimate processes to enter the country.

[42] *I therefore set the starting point which in my view is appropriate to this offending and that is at two years nine months' imprisonment and that is 33 months. I am prepared to allow some modest amount for the clean record but it is a modest amount for the reasons I have already outlined and I deduct one month to reflect that which leads to a first total of 32 months' imprisonment.*

[43] *A full 25 percent is appropriate which would reduce that 32 months by eight months to an end result of 24 months' imprisonment. That is the penalty that I intend to impose and on the one charge I therefore sentence Mr Lin to two years' imprisonment.*

[8] The sentencing judge noted the courts have taken an approach of condemning dishonest conduct in the context of immigration.

[9] The Respondent has not engaged in the inquiry process and as such no response to the allegations has been received.

Board's Conclusion and Reasoning

[10] The Board has decided that the Respondent **has**:

- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work;
- (d) has, for the purpose of becoming licensed himself or herself, or for the purpose of any other person becoming licensed (s 317(1)(e) of the Act):
 - (i) either orally or in writing, made any declaration or representation, knowing it to be false or misleading in a material particular; or
 - (ii) produced to the Registrar or made use of any document, knowing it to contain a declaration or representation referred to in subparagraph (i); or
 - (iii) produced to the Registrar or made use of any document, knowing that it was not genuine; and
- (a) 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)

and should be disciplined.

[11] The reasons for the Board's decision follow.

Convicted of an Offence

- [12] The disciplinary provision in s 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent “*has been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more*”.
- [13] The offence committed carries a maximum penalty of seven years’ imprisonment and a fine of \$100,000 or both. The first element of the disciplinary provision is therefore satisfied.
- [14] The second element of the disciplinary charge is “*Does the commission of that offence(s) reflect adversely on the person's fitness to carry out or supervise building work or building inspection work*”.
- [15] This element requires consideration by the Board of the interrelationship between the convictions and the Respondent’s fitness to be a licensed person. In this respect the Board notes the dishonesty element of the offending and the fact that the Respondent used a false identity to obtain a licence.
- [16] Unlike other licensing regimes the licensed building practitioner regime does not contain any provisions which require an assessment of an applicant’s character or fitness to hold a licence at the time they apply⁶. Rather, in the Building Act, there is an ability to assess this subsequent to a person being licensed by way of s 317(1)(a) and it does not matter that the criminal offending predated the person being licensed.
- [17] The Board notes, as regards “fitness” the High Court commented in *Professional Conduct Committee v Martin*⁷:
- Fitness' often may well be something different to competence. Aspects of general deterrence as well as specific deterrence remain relevant. So too, is the broader consideration of the public or community's confidence and the upholding the standards of the nursing profession.*
- [18] The Board considers the offending was serious and as it involved dishonesty the offending will have an effect on public confidence. Given this the Board finds that the second element of 317(1)(a) has been established in that the convictions reflect adversely on the Respondent’s fitness to carry out or supervise building work or building inspection work.

Obtaining a Licence by Deception

- [19] Section 317(1)(e) of the Act contains three alternatives. All relate to obtaining a licence. They are making a false or misleading declaration or representation,

⁶ Compare with the licensing provisions in s 91(d) of the Electricity Act 1992 and s 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006 both of which have a requirement to be a fit and proper person for registration

⁷ High Court WN 2007

producing a false or misleading document and making use of a document knowing it was not genuine.

- [20] The Board obtained, as part of the evidence before it, the Respondent's application for a building practitioner licence. In it the Respondent used the false name, provided a false identity in the form of a driver's licence in the false name and made a false declaration. The Board notes that under regulation 7 of the Licensed Building Practitioners Rules 2007⁸ there is a mandatory requirement to provide those details and documents and to declare that they are true. As such all three alternatives of section 317(1)(e) have been made out and the Board finds that the disciplinary offence has been committed.

Disrepute

- [21] The Board considered the disrepute provisions in Board Decision C2-01111⁹ and discussed the legal principles that apply. The Board noted that the Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"¹⁰ and that 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*¹¹ 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.*¹²

- [22] 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 convictions¹³;
- honest mistakes without deliberate wrongdoing¹⁴;
- provision of false undertakings¹⁵; and
- conduct resulting in an unethical financial gain¹⁶.

- [23] Turning to the facts the Respondent has been convicted of serious criminal offending. The offending involved a deliberate deceit which was continued when the Respondent sought a building practitioner licence. Such conduct would, when

⁸ Refer regulation 7.

⁹ Board decision dated 2 July 2015.

¹⁰ 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

¹¹ [2012] NZCA 401

¹² [2012] NZAR 1071 page 1072

¹³ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁵ *Slack, Re* [2012] NZLCDT 40

¹⁶ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

viewed objectively, be such as to bring the regime into disrepute and as such the disciplinary charge is found to have been committed.

Penalty, Costs and Publication

- [24] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [25] 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

- [26] 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*¹⁷ 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.

- [27] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ 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.
- [28] The Board notes from its inquiries that the Respondent will most likely be deported once released from custody. It also notes that the Respondent has been punished for his offending in a competent court. Given these factors the Board considers any penalty should be directed at protecting the public and upholding the integrity of the licensing regime.
- [29] The Respondent has been found to have committed three disciplinary offences. The Board will, however, treat them as a single offence as they all relate to the same conduct.

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [30] Having considered the facts before it and on the basis of the above the Board considers cancellation of the Respondent's licence is the only realistic option open to it. This will ensure that the falsely obtained licence and authority to undertake restricted building work in New Zealand is removed.

Costs

- [31] 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."
- [32] 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 case¹⁹.
- [33] In *Collie v Nursing Council of New Zealand*²⁰ 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.

- [34] Based on the above the Board's costs order is that the Respondent is pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [35] 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 Act²¹. 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.

- [36] 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.
- [37] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out

¹⁹ *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.

²⁰ [2001] NZAR 74

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. 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*²⁵.

- [38] 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 interest²⁶. 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.
- [39] Based on the above the Board will order further publication. The publication will summarise the facts and outcome of the case and will be made in Code Words and on the Boards website.

Section 318 Order

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

Penalty: Pursuant to s 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of five [5] years.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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 be action taken to publicly notify the Board's action.

- [41] 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

- [42] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **29 March 2018**. The submissions should focus on mitigating matters as they relate to the

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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

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

Signed and dated this 8th day of March 2018



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

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

ⁱⁱ **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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