Before the Building Practitioners Board

	BPB Complaint No. C2-01895
Licensed Building Practitioner:	Mark Berryman (the Respondent)
Licence Number:	BP 112376
Licence(s) Held:	Carpentry and Site AOP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	25 September 2018
Final Decision Date:	7 December 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
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.

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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[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.

Procedure

[5] The Board heard the matter on 25 September 2018. It issued a decision on 30 October 2018 and invited the Respondent to make submissions on penalty costs and publication.

[6] On 19 November 2018 the Board received a submission from legal counsel acting for the Respondent. The submission noted a possible date error in the Board's decision. The decision referred to an email of 19 March 2016. Counsel submitted the email was dated 19 March 2018. The Board has confirmed that the date should have been recorded as 19 March 2018.

[7] Counsel sought a recall of the decision. Reference was made to the power of a judge to recall a decision under rule 11.9 of the High Court Rules 2016.

[8] On 20 November 2018 the Board received submissions on penalty costs and publication.

[9] The Board has considered the submission as regards a recall of its decision. It notes High Court decisions include a process of drawing up a formal record which is sealed. Board decisions are not sealed but there is a process of finalising the decision and formally recording the result on the Register of Licensed Building Practitioners.

[10] The Board has decided that it will reissue its decision to rectify the date error. It is to be noted that the Board's substantive finding has not changed. The Respondent has still been found to have committed a disciplinary offence by failing to provide a record of work on completion of restricted building work.

[11] The Board has also made a final decision as regards penalty costs and publication.

Evidence

[12] 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.

[13] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question

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

witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

[14] The Respondent was a licensed building practitioner involved in a renovation of an existing dwelling. The building work was carried out under a building consent and included restricted building work.

[15] The building work started on or about 6 March 2015. It proceeded until a contractual dispute arose in August 2015. Discussions ensued between the Complainant and [Omitted] who contracted to complete the building work and for whom the Respondent worked.

[16] On 23 December 2015 an agreement was reached to resolve the dispute. The agreement provided for remedial work that needed to be carried out. The Respondent maintained that the remedial work included restricted building work in that items noted in a final inspection of 18 February 2016 had to be completed.

[17] The remedial work was carried out by other contractors. [Omitted] were aware that this would occur having been advised by the Complainant. Further email correspondence from [Omitted] on 15 February 2016 included a request for those other contractors to apply silicone.

[18] On 22 September 2016 the Complainant's lawyer advised [Omitted] that the contract was cancelled due to the failure to adhere to the terms of the 23 December 2015 agreement.

[19] The Respondent swore an affidavit to the effect that he posted a record of work on 31 October 2016 to the owner and that he lodged the same with the Council. The Complainant stated it had not been received.

[20] On 19 March 2018 the Respondent sent an email to the Complainant noting the Complainant had sought a code compliance certificate. He stated:

> We acknowledge your request for CCC documentation at [Omitted], on payment of the outstanding bills we will have these documents issued.

Board's Conclusion and Reasoning

[21] 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.

[22] 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].

[23] 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.

[24] 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 …".

[25] The question for the present matter is when did completion occur.

[26] In most situations questions as to when completion occurs and when the record of work should be provided do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where the licensed practitioner, owner, or territorial authority's perceptions as to when the record of work must be provided may differ.

[27] In the present case there are two matters which may impact on the question of when the restricted building work was complete. The first is the status of the remedial work and the second is the ongoing commercial dispute.

[28] The Board has stated in previous cases that where there is a genuine commercial dispute which is being negotiated, restricted building work that has to be completed, and a realistic possibility of the licensed building practitioner being able to return to complete the restricted building work the requirement to provide a record of work may not arise until such time as the negotiations are complete. If the negotiations result in the restricted building work being carried out then a record of work will be required when that work is complete. If the negotiations do not result in further restricted building work being carried out then the obligation to provide a record of work then arises.

[29] In its initial decision dated 30 October 2018 the Board wrongly referred to an email from the Respondent dated 19 March 2016 noting that a code compliance certificate was being sought by the Complainant and that it was being withheld for commercial reasons. The actual date of the email was 19 March 2018. The Board has reconsidered its finding in light of this.

[30] Looking at the facts there was a commercial dispute which was ongoing until 23 September 2016 and a record of work was, on the Respondent's evidence, provided to the owner and the territorial authority on 31 October 2016. The Complainant's evidence was that one was not received. It is to be noted that when the Complainant

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

sought a code compliance certificate he required a record of work to obtain one which indicates the territorial authority may not have received one.

[31] There was also evidence before the Board which showed that what was being claimed as outstanding restricted building work by the Respondent had, in fact, been completed by other contractors in or about April 2016 and that the Respondent knew or should have known of this.

[32] The Board's initial findings included a finding that the record of work was due, at the earliest, in March 2016. That finding was erroneous in that it was based on an incorrect date for the aforementioned email.

[33] The Board also found in its initial decision that the latest date on which the record of work was due was April 2016. This Board confirms that finding.

[34] On the Respondent's evidence a record of work was not provided till 31 October 2016. Excluding April that is six months after it was due.

[35] In C2-01170[7] the Board noted that in other jurisdictions such as those under the Plumbers, Drainlayers, and Gasfitters Act 2006 and the Electricity Act 1992 stipulate definitive time frames for the completion and provision of certification documentation by practitioners. The Building Act does not. Both s 88(1) and 317(1)(da)(ii) simply state "on completion". As such it is open to the Board to interpret how soon after actual completion (bearing in mind the discussion on completion outlined above) the record of work must be provided.

[36] On a literal interpretation the obligation to provide a record of work would be at the same time as completion. This would be impracticable and therefore cannot be the intended meaning. Time frames have not been specified and nor has Parliament chosen to use phrases such as "immediately on completion" or "as soon as reasonably practicable". Given this and taking into consideration the requirement to give effect to the purpose of Parliament[8] the Board considers the use of the words "on completion" denotes a short time thereafter.

[37] A degree of reasonableness has to be applied to this interpretation. Differing circumstances may result in longer or shorter timeframes. Generally the prescribed form for a record of work is simple and straightforward and a licensed building practitioner ought to know what they have or have not done or supervised and as such there should be few impediments to it being completed and provided in short order. The situations where this is not the case will be rare and will have to be justified by the practitioner.

[38] In C2-01170 the Board found that six weeks was not a reasonable time frame.

[7] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[8] Section 5 of the Interpretation Act 1999

[39] The six-month delay in the present case does not meet the requirement of a short time after completion. On this basis the Board finds that the disciplinary offence has been committed.

[40] 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.

[41] The Respondent has raised that the restricted building work was not complete. This has already been dealt with above. The restricted building work was complete in April 2016 well before the record of work was provided.

Penalty, Costs and Publication

[42] 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.

[43] In its initial decision the Board set out its indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters.

[44] On 20 November 2018, the Board received the Respondent's submissions. It has considered them and made the following decisions.

Penalty

[45] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[9] commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

> *[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[46] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[10] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a

[9] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[10] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[47] The Board's indicative penalty was that the Respondent pay a fine of $1,500. It noted that record of work matters are at the lower end of the disciplinary scale and that the Board's normal starting point for a failure to provide a record of work is a fine of $1,500.

[48] The Board noted that the present case was complicated by the commercial dispute which the Respondent has been caught up in. It also notes that once the commercial relationship finally came to an end, a record of work was provided.

[49] On this basis the Board decided that it will censure the Respondent. A censure is a formal expression of disapproval.

[50] Counsel's submission was that the Board should not take any disciplinary action. The submissions noted that there was a low likelihood of future offending, the Respondent's good standing in the community and the costs incurred as a result of the complaint. It was also submitted that the Respondent was regretful for any errors made.

[51] Counsel for the Respondent also submitted that:

> *13. In lights of those matters, it is asked that no further penalty be placed on Mr Berryman – i.e. that no censure issued and no fine imposed. It is submitted that this step is appropriate to ensure that Mr Berryman can continue his social contribution through Habitat for Humanity.*
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> *14. Notably, neither section 317 nor 218 require further action to be taken by the Board even where a determination has been made against a building practitioner.*

[52] The Board notes that section 318 states the Board "may". The use of may implies a discretion. It is to be noted, however, that similar disciplinary regimes such as that under the Electricity Act 1992[11] contain specific provisions which allow the Board to not take any action. A similar provision was not included in the Building Act.

[53] Taking this into account, with the purposes of the Register which includes to allow informed consumer choice, the Board does not consider it has a discretion to take no action. Moreover it considers that a censure, in the present case, is still the appropriate penalty.

Costs

[54] 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."

[55] 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

[11] Refer section 147M(1)((h) of the Electricity Act 1992

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[12].

[56] In *Collie v Nursing Council of New Zealand*[13] 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.*

[57] The Board notes the matter was dealt with at a hearing having been set down to be heard on the papers. Ordinarily costs for a hearing would be in the order of $1,000 and those for an on the papers hearing would be $500. In this instance the Board acknowledges that the hearing was of value and as such it orders that the costs be retained at the level of an on the papers hearing.

Publication

[58] 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[14]. 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.*

[59] 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.

[60] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[15]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[16]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[17]. 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*[18].

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[12] *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.
[13] [2001] NZAR 74
[14] Refer sections 298, 299 and 301 of the Act
[15] Section 14 of the Act
[16] Refer sections 200 and 202 of the Criminal Procedure Act
[17] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[18] ibid

[61] 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[19]. 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.

[62] Based on the above the Board will not order further publication. It will, however, take steps to communicate the general findings with licensed building practitioners.

Section 318 Order

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

Penalty:	**Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.**
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.

[64] 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.

Right of Appeal

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

Signed and dated this 7th day of December 2018



Chris Preston
Presiding Member

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[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

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

(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.