

Before the Building Practitioners Board

	BPB Complaint No. CB25188
Licensed Building Practitioner:	Peter Carey (the Respondent)
Licence Number:	BP 108146
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	On the Papers
Draft Decision Date:	6 December 2019
Final Decision Date:	4 March 2020
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	David Fabish, LBP, Carpentry and Site AOP 2
	Rob Shao, LBP, Carpentry and Site AOP 1

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] On 6 November 2019 the Board received a Registrar’s Report in respect of a complaint into the conduct of the Respondent.
- [2] 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.
- [3] Having received the report the Board decided that regulation 9 applied to aspects of the complaint but not to the allegation that the Respondent had failed to provide a record of work on completion of restricted building work under section 317(1)(da)(ii) of the Act. Under regulation 10 the Board is required to hold a hearing in respect of that matter.

Regulation 9 Decisions

- [4] The complaint to the Board also contained allegations that the Respondent had carried out building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act.

- [5] With regard to that allegation the Board decided that regulation 9(f)(ii) applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

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

- [6] The Board noted that aspects of the complaint related to building work that was carried out by other licensed persons. Each licensed person is responsible and accountable for their own work. As such the Board can only further investigate building work for which the Respondent is, under the licensing regime, responsible and accountable for.
- [7] In considering whether the investigation of a complaint is necessary the Board is also required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*¹ Justice Gendall stated, as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [8] Again, in *Pillai v Messiter (No 2)*² the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [9] On this basis the Board has taken the position that seriousness is a matter for consideration by it in determining whether or not the Respondent has been negligent or incompetent.
- [10] 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 it will not proceed with the allegations of negligence or incompetence.

¹ [2001] NZAR 74

² (1989) 16 NSWLR 197 (CA) at 200

Draft Decision Process

- [11] 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 procedures³. 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 legislation⁴. 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.
- [12] 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.
- [13] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. The Respondent will be provided with an opportunity to make 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.

Function of Disciplinary Action

- [14] 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*⁵ and in New Zealand in *Dentice v Valuers Registration Board*⁶.
- [15] 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*⁷ 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.”

³ Clause 27 of Schedule 3

⁴ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

⁵ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁶ [1992] 1 NZLR 720 at p 724

⁷ [2016] HZHC 2276 at para 164

- [16] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [17] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁸. 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.
- [18] The Respondent was engaged to carry out building work on a new residential build under a building consent. The building work included restricted building work. A record of work must be provided on completion of restricted building work. The Complainant stated that one was not provided, and that the Respondent had refused to provide a record of work until such time as a civil dispute was resolved. A complaint was made to the Board about the non-provision on 4 April 2019.
- [19] The Respondent provided a written response to the complaint. The Respondent included a record of work dated 17 May 2019. The Respondent stated that the Complainant had not requested a record of work and that at no time had he refused to provide one.

Draft Conclusion and Reasoning

- [20] 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
- [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 work⁹.
- [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 C2-01170¹⁰ 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

⁸ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁰ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner will have to provide a record of work even though all of the intended restricted building work has not been completed.
- [27] This is what has occurred in the present case. The contractual relationship came to an end in or about 18 December 2014. At that point in time it was clear that the Respondent would not be returning to carry out any further restricted building work and it appeared, from the evidence before the Board, that the house was complete. Given these circumstances the Respondent’s restricted building work had, in effect, been completed and a record of work was then due.
- [28] A record of work was not been provided until such time as a complaint was made. It was dated 17 May 2019. On this basis the disciplinary offence has been committed.
- [29] 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.
- [30] In this instance there was an ongoing 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.
- [31] The Respondent has also noted that the Complainant had not requested a record of work. In this respect the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations.

Draft Decision on Penalty, Costs and Publication

- [32] 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.
- [33] 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

- [34] 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*¹¹ 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.

- [35] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹² 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.
- [36] 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.
- [37] In this instance the Board notes that the relevant conduct occurred in 2014. The Board is required to consider the penalty in light of the sanctions being imposed at that time. In 2014 the record of work provisions were new and the Board was being lenient whilst practitioners were adjusting to the new requirement. Given this the Board has decided that the Respondent will be censured. A censure is a formal expression of disapproval.

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [38] 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.”
- [39] 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 case¹³.
- [40] In *Collie v Nursing Council of New Zealand*¹⁴ 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.*
- [41] 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

- [42] 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 Act¹⁵. 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.*
- [43] 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.
- [44] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out

¹³ *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.

¹⁴ [2001] NZAR 74

¹⁵ Refer sections 298, 299 and 301 of the Act

¹⁶ Section 14 of the Act

grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁸. 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*¹⁹.

[45] 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 interest²⁰. 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.

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

Draft Section 318 Order

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

Penalty: Pursuant to section 318(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.

[48] 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

[49] The Board invites the Respondent and/or Complainant 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.

[50] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 13 January 2020.

¹⁷ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

²⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [51] If submissions are received, then the Board will meet and consider those submissions.
- [52] 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.
- [53] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [54] 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.
- [55] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 13 January 2020

Submissions Made

- [56] The Board received a submission from the Respondent on 3 January 2020 and from the Complainant on 7 January 2020.
- [57] The Respondent submitted that he had not deliberately withheld a record of work. He reiterated matters that were before the Board in the original file including the time line and his submission that the building work was not complete a payment dispute prevented his being able to return and complete and that the uncertainty as to whether he would return or not meant that he did not provide the record of work.
- [58] The Respondent provided a timeline in support of the submission. He noted that the first time he was made aware that the building work had been completed by other contractors was when the complaint was made in April 2019. The Respondent noted that a record of work was provided in May 2019 to the territorial authority and that this was done as soon as he was aware that he would not be doing any further work on the house.
- [59] The Respondent referred to an email from the Complainants dated 18 April 2019 which was included in the documentation before the Board. He called its veracity into question.
- [60] The Respondent also made submissions as regards penalty and publication should the matter be upheld. He noted the personal impact on him and the impact that publication would have.
- [61] The Complainant's submissions dealt with matters that were not related to the disciplinary matter under consideration. The Complainant should note that if there is fresh evidence that was support a different ground of discipline that they are at liberty to make a new complaint.

Final Decision

- [62] The Board has considered the submissions made and has decided that its draft decision will be confirmed.
- [63] The Board noted, in reviewing the submissions, that the matters raised by the Respondent were taken into consideration by it when it issued its draft decision.
- [64] The important factors are that the Respondent did not carry out any further building work after a dispute arose in 2014 and that a record of work was only provided once a complaint had been made. The Respondent should 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. They must act of their own accord and not wait for others to remind them of their obligations.
- [65] In this matter the Respondent simply sat back and waited for civil proceedings, which did not occur under March 2019 to take place. It was unrealistic and unreasonable for him to consider that he might be returning to complete the building work after such an extended period. The Board also notes he took no steps in the intervening period. Nor did he make any enquiries as to the status of the build.
- [66] With regard to the penalty submissions the Board has indicated that it would censure the Respondent. This is the least action that the Board can take under section 318. The penalty remains appropriate.
- [67] In terms of publication the Board indicated it would not take action to further publish the matter but that the outcome would be recorded on the Register of Licensed Building Practitioners in accordance with section 301(1)(l)(iii) of the Act. The Register is established by s 298 of the Act and s 299 sets out its purposes which are:
- The purpose of the register is—*
- (a) *to enable members of the public to—*
- (i) *determine whether a person is a licensed building practitioner and, if so, the status and relevant history of the person's [licensing]; and*
- (ii) *choose a suitable building practitioner from a list of licensed building practitioners; and*
- (iii) *know how to contact the building practitioner; and*
- (iv) *know which licensed building practitioners have been disciplined within the last 3 years; and*
- (b) *to facilitate the administrative, disciplinary, and other functions of the Board and the Registrar under this Act.*
- [68] Section 301 sets out the matters to be contained in the Register. The section uses the phrasing “must” which makes the provisions mandatory, not discretionary:

(1) *The register must contain all of the following information, to the extent that the information is relevant, for each licensed building practitioner whose name is entered in the register:*

- (l) *information about the status and history of the person's [licensing], particularly—*
 - (i) *the class [in which the person is licensed]; and*
 - (ii) *the date on which the person's name was entered in the register; and*
 - (iii) *any action taken under section 318 on a disciplinary matter in respect of the person in the last 3 years:*

[69] The final provision, action taken under section 318, is the reason why detail on the disciplinary offence must be contained in the Register.

[70] Taking the above provisions into consideration it is clear that one of the purposes of the Register is to enable a more informed consumer. Providing information as regards disciplinary action helps to facilitate this. It is also clear that the Board has no discretion as regards information on disciplinary action being retained on the Register.

[71] Given the above the Board affirms its draft decision and penalty.

Final Section 318 Order

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

Penalty: Pursuant to section 318(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.

Right of Appeal

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

Signed and dated this 4th day of March 2020

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive style with a horizontal line underlining the name.

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.*