

Before the Building Practitioners Board

	BPB Complaint No. C2-01389
Licensed Building Practitioner:	Stuart Atkins (the Respondent)
Licence Number:	BP 117019
Licence(s) Held:	Brick and Blocklaying Licence (Structural Masonry; 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	Inquiry
Hearing Location	Christchurch
Hearing Type:	On the Papers
Hearing Date:	27 September 2016 and 7 September 2017
Decision Date:	15 September 2017
Board Members	Richard Merrifield (Presiding) Mel Orange Brian Nightingale Bob Monteith

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 Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ 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) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) 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).

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

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

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.

Background to the Complaint

- [3] This matter was originally set down for a hearing on 27 September 2016. At the commencement of the hearing the Board noted the Respondent's license was issued on 25 May 2012 but was suspended between 26 June 2013 and 25 October 2013 as a result of action taken under section 293 of the Act.
- [4] Council inspection records before the Board showed that the building work (brickwork) under investigation and at the centre of the Inquiry was carried out over a short period which preceded the suspension and then a short period during the suspension. In this respect the Board notes the provisions of s 297(1) of the Act which states "a person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her [licensing] is suspended".
- [5] Under s 85 of the Act it is an offence for a person who is not a licensed building practitioner to carry out restricted building work. Brickwork completed under a building consent is restricted building work. The prosecution of matters under s 85 falls to the Ministry of Business, Innovation and Employment (the Ministry). The Board does not have any jurisdiction over such matters.
- [6] Nor does the Board have jurisdiction in respect of a licensed building practitioner during periods when their licence is suspended or cancelled. They are, for all intents and purposes, an unlicensed person during such periods. Hence the application of section 85 of the Act when, during such a period, they carry out restricted building work.
- [7] Given the above matters the Board adjourned the hearing and referred the issue as regards restricted building work being carried out by a non-licensed person to the Ministry for investigation before proceeding any further with the hearing. It also directed the Registrar to investigate what work was done during what periods of the build and in particular if any of the building work was completed prior to 26 June 2013 when the Respondent was a licensed building practitioner.
- [8] On 11 July 2017 the Registrar concluded his further investigations and reported the finding to the Board by way of a Memo.
- [9] The Board does not know whether the section 85 matters have proceeded but is mindful of the delay and as such it resolved to deal with the matter with the evidence before it. A hearing on the papers was reconvened on 7 September 2017.

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

Evidence

- [10] 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.
- [11] A Selwyn District Council inspection carried out on 18 July 2013 of “half-height brick” indicated that the Respondent may have carried out restricted building work during a period when he was a licensed building practitioner. That inspection did not stipulate when the actual work was carried out other than it was at some time prior to 18 July 2013.
- [12] A record of work was subsequently provided to the Board as part of the Respondent’s initial response to the inquiry. It was dated 3 November 2013 and an accompanying email showed it was provided to the main contractor (not the owner) on 4 November 2013.
- [13] The Respondent’s legal counsel made a submission to the Board in anticipation of the resumed hearing. He submitted:

We are of the view that the Board still has no jurisdiction as to hearing matters in association with section 317(1)(b) negligence & incompetence, or 317(1)(d) work contrary to a consent – as both of those matters depend on the outcome of the MBIE s.85 investigation if one is still ongoing, to which we have no knowledge at this point whatsoever.

- [14] With regard to the allegations under section 317(1)(da)(ii) of the Act the Respondent’s counsel further submitted:
- a. it is alleged our client did not provide a record of work or producer statement for his work. In preparation for the original hearing I tried to expedite that matter by emailing the board a copy of the Record of Work and the correspondence whereby that was supplied to the head contractor Bainbridge Homes, and subsequently has been supplied to the local authority for the purposes of issue of code compliance. To be frank I am surprised this was alleged in the first place when [omitted] appears to be aware that code compliance had issued on the project, and that he (with his experience) ought to have been aware that would not have occurred without the local authority having been provided the record of work.*
 - b. if the issue is that the home owner personally did not receive it, then the response to that is that Mr Atkins did not have a contract with the home owner, he had a contract with Bainbridge Homes and supplied the Record of Work, in the usual manner as was habit having worked with Bainbridge Homes frequently, that it was supplied at the time of code*

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- compliance application and upon request. He home owner never made a request for a record of work directly. Had he done it would have been supplied. Mr Atkins is aware of his responsibility to do so under the Act.*
- c. *If the issue is now that a record of work should been supplied as at 26th June 2013 when the suspension took place, then we respond that our client was initially unaware that a suspension had been put in place as the payment advice for the fees that were overdue had been sent to his previous address through administrative errors, and that when the address issue was rectified he paid those fees immediately. It was therefore not at the forefront of Mr Atkins mind that he should have been disqualified from continuing work in that period and have to issue interim Records of Work if such a thing exists, and that the clients and owners were better served by him bringing his fees up to date and completing the job professionally and issuing a full record of work – which was duly done. In that circumstance the result is an administrative oversight and not something that a practitioner with a 15 year plus record should be penalized for.*

Board's Conclusion and Reasoning

- [15] The Board has decided that the Respondent **has not**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); or
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- [16] The Board has also 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.
- [17] The reasons for the Board's decision as are follows:

Negligence and/or Incompetence and Contrary to a Building Consent

- [18] The Board does not agree with the submission that it is not able to inquire into the conduct of the Respondent with regard to these charges because the matters are or may be the subject of an investigation under section 85 of the Act. Any inquiry by the Board would be limited to the conduct up to the point in time when the Respondent was no longer licensed which is an entirely separate matter from conduct to which section 85 relates. However, as regards the two charges the Board does not have sufficient evidence to determine whether the work subject to the allegation of

negligence or not in accordance with the building consent was carried out whilst the respondent was licensed or suspended.

Record of Work

- [19] 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 work⁵.
- [20] 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.
- [21] The Board discussed issues with regard to records of work in its decision C2-01170⁶ 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.
- [22] 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.
- [23] 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 ...”.
- [24] 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. In this instance though completion came about as a result of the Respondent’s suspension. The suspension itself arose as a result of action taken under section 293 of the Act which relate to a failure to meet the minimum standards for licensing. As such it was the Respondent’s own actions that resulted in his suspension. Counsel has stated that the Respondent did not receive the notice of the suspension as a result of an administrative error and the Respondent not receiving notices. He did not state what the error was. The Board notes that under the Act it is the Respondent’s responsibility to maintain his details on the Register and ensure they are correct. It is also his obligation to ensure he is licensed and he should not wait for others to remind him of such an obligation.

⁵ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁶ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [25] From the point of his suspension the Respondent was no longer able to carry out restricted building work. In this respect completion, as far as his restricted building work was concerned, had occurred and a record of work was due.
- [26] Counsel for the Respondent has submitted that one was provided to the main contractor and subsequently, via the main contractor, to the Council. This occurred on 4 November 2013 some 4 months after the suspension and almost as long since the blockwork passed a council inspection being 18 July 2013.
- [27] The more important aspect though is that the main contractor is not and was not the owner. The Act clearly states it is the owner that has to be provided with the record of work. Contractual issues do not come into play and in this respect a licensed building practitioner should not rely on others, such as a main contractor, to carry out their obligations in the provision of a record of work.
- [28] It must also be noted 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. A claim that the licensed building practitioner was not asked for a record of work, as is submitted here, will not be a defence. They must act of their own accord and not wait for others to remind them of their obligations.
- [29] Given that the record of work was only provided following the inquiry being commenced and then well and truly after the Respondent's ability to carry out restricted building work had ceased the Board finds that the elements of the offence have been made out.
- [30] 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.
- [31] In this instance the suspension and the issues around it are not considered to be good reasons as they came about as a result of the Respondent's own failings.

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*⁷ 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*⁸ 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. However it must take into account that the disciplinary offending occurred in 2013 when records of work were relatively new. The Respondent will, therefore, be penalised on the basis of the Board's penalties awarded for record of matters at the time.

[37] The Board must also take into account the matters outlined in the Counsel for the Respondent's submissions as regards inadvertence resulting in the suspension and the provision of the record of work to another person. These factors will be taken into account as mitigation.

[38] Having taken the above factors and the mitigation into account the Board considers a fine of \$500 to be appropriate.

Costs

[39] Under s 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

⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case⁹.

- [41] In *Collie v Nursing Council of New Zealand*¹⁰ 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] Whilst the matter was initially convened as a hearing the Board has, given the delays, approached the matter as if it was a hearing on the papers. 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. This is significantly less than the 50% amount noted above by the Courts as reasonable.

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 Act¹¹. The Board is also able, under s 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.
- [45] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁴. 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*¹⁵.

⁹ *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.

¹⁰ [2001] NZAR 74

¹¹ Refer sections 298, 299 and 301 of the Act

¹² Section 14 of the Act

¹³ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁵ *ibid*

[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 interest¹⁶. 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 s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$500.

Costs: Pursuant to s 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 s 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 **9 October 2017**. 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 those submissions prior to coming to a final decision on penalty, costs and publication.

¹⁶ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 15TH day of September 2017



Richard Merrifield
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.*