

BPB Complaint No. C2-01397

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners'
Board under section 315 of the Act

AGAINST

Weida Lin, Licensed Building Practitioner No.
BP 108930

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] The Complainant lodged a complaint with the Building Practitioners' Board (the Board) on 27 April 2016 in respect of Weida Lin, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent, in relation to building work at [omitted] 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).
- [3] The Respondent is a Licensed Building Practitioner with a Brick and Blocklaying (Structural Masonry Veneer) Licence issued 9 August 2011.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
- | | |
|-------------------|------------------|
| Chris Preston | Chair(Presiding) |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Robin Dunlop | Board Member |
- [6] The matter was considered by the Board in Auckland on 4 October 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

- [8] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [9] On 27 June 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- [10] On 28 July 2016 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint 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).
- [11] On 15 August 2016 the Respondent was sent a Notice of Hearing outlining that the matter would be dealt with on the basis of the papers before it, but that the Respondent could attend by phone or video conference or in person at his own cost.

Function of Disciplinary Action

- [12] 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 Kingdom¹.
- [13] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.
- [14] It must also be noted that the Board has jurisdiction only with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

The Hearing

- [15] The hearing commenced at 1.30 p.m.
- [16] The papers before the Board were admitted into evidence.

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

² [1992] 1 NZLR 720 at p 724

Substance of the Complaint

- [17] The allegation was that the Respondent failed to provide a record of work on completion of restricted building work.

Evidence

- [18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*³ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [19] The Respondent carried out restricted building work under a building consent. This included foundation block work and membrane tanking to retaining walls. The work was started in September 2013 and the Respondent’s work was finished in late 2013.
- [20] The Complainant stated a record of work was not provided by the Respondent despite multiple requests. The Complainant advised that the main contractor went into liquidation and the Respondent told him that as he had not been paid he would not issue a record of work.
- [21] The Respondent provided a response to the complaint on 2 June 2016. In it he stated he carried out the block work and waterproofing, was not paid and would not provide a PS3 until paid.
- [22] On 7 July 2016 the Respondent emailed stating:
- “I just realised that I ONLY laid some blocks and some of tanking. Then I required money from site manager. He got his workers to finish blocklaying and tanking.”*

³ [2009] 1 NZLR 1

Boards Conclusion and Reasoning

- [23] There is a statutory requirement under s 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 work⁴.
- [24] Failing to provide a record of work is a ground for discipline under s 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.
- [25] The Board discussed issues with regard to records of work in its decision C2-01170⁵ 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, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [26] 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 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.
- [27] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provision in s 88(1) simply states “on completion of the restricted building work ...”.
- [28] 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 practitioner, owner, or territorial authority’s perceptions as to when the record of work must be provided may differ.
- [29] One such situation is where it is clear the licensed building practitioner will not be able to carry out any further restricted building work on a site. This may occur for a variety of reasons including, as occurred here, the liquidation of a main contractor. In such a situation, even though the intended work has not been completed, the licensed building practitioner’s restricted building work under the building consent has, in effect, been completed as they will not be carrying out any further restricted building work.
- [30] In this respect it must also be borne in mind that a record of work can capture not only what has been done but also what has not been done by the licensed building practitioner. By providing adequate detail within the record of work they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [31] The Act provides that a record of work must be provided to both the owner and the territorial authority⁶. Providing a record of work to one but not the other will not satisfy the requirements of the Act. Both must be provided with a correctly completed record of work. Neither has been provided with a record of work in this instance.

⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁵ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁶ s 88(2)

- [32] 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 will not be a defence. They must act of their own accord and not wait for others to remind them of their obligations.
- [33] Finally s 317(1)(da)(ii) of the Act provides for a defence of the licensed 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.
- [34] 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. As such no good reason is found to have existed.

Board Decision

- [35] 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.

Disciplinary Penalties

- [36] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹.
- [37] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [38] As part of the materials provided to the Board for the Hearing, the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was the financial loss incurred.
- [39] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on, the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there are further matters which the Board should take into consideration.
- [40] As stated earlier 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.

- [41] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*⁷ has commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[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.

- [42] On the basis of the above and taking into consideration the mitigation the Board considers a fine of \$1,000 is appropriate. This is consistent with penalties imposed on other licensed building practitioners for similar disciplinary offending.

Costs

- [43] 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."

- [44] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*⁸ included the following:

"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."

- [45] The judgment in *Macdonald v Professional Conduct Committee*⁹ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*¹⁰ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [46] In *Collie v Nursing Council of New Zealand*¹¹ 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. It is not hard to see that the award of costs may

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

⁸ HC, Wellington, AP23/94, 14 September 1995

⁹ HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹⁰ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹¹ [2001] NZAR 74

have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.

- [47] The Board notes the matter was dealt with 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.

Publication of Name

- [48] 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.
- [49] 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.

- [50] 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.
- [51] The Board does not consider any further publication is required.

Penalty, Costs and Publication Decision

- [52] 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 \$1,000.

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 him being named in this decision.

Submissions on Penalty Costs and Publication

- [53] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 26 October 2016.
- [54] If no submissions are received then this decision will become final.
- [55] 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

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

Signed and dated this 14th day of October 2016.



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*

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- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*