Before the Building Practitioners' Board
At Auckland

BPB Complaint No. C2-01404

Under the Building Act 2004 (the Act)

IN THE MATTER OF	A complaint to the Building Practitioners' Board under section 315 of the Act
AGAINST	Jibin Zhang, Licensed Building Practitioner No. BP 109820

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 4 May 2016 in respect of Jibin Zhang, Licensed Building Practitioner (the Respondent).

[2] The complainant alleged the Respondent has, in relation to building work at [omitted] 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 Carpentry and Site (Area of Practice 2) Licences issued 3 November 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:

Richard Merrifield	Deputy Chair (Presiding)	Licensed in Carpentry and Site Area of Practice 2
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Dianne Johnson	Board Member	Registered Building Surveyor
Bob Monteith	Board Member	Licensed in Carpentry and Site Area of Practice 2

[6] The matter was considered by the Board in Wellington on 12 December 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 24 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 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 11 October 2016 on the basis of the papers before the Board but that the Respondent could attend by phone or video conference or in person at his own cost.

[12] Subsequent to the Respondent receiving the Notice of Hearing he provided submissions. These raised issues as to the identity of the persons carrying out the restricted building work. As a result the Board adjourned the matter to allow for the collection of further information.

Function of Disciplinary Action

[13] 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[1].

[14] 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.*

[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

[15] 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.

Substance of the Complaint

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

Evidence

[17] 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.*

[18] The Respondent undertook restricted building work in relation to alterations and extensions to the Complainant's home between November 2013 and September 2014. The Complainant alleged the Respondent failed to provide a record of work and that this has hindered his obtaining a code compliance certificate.

[19] The Respondent provided a written response to the complaint on 9 June 2016. In his response he addressed matters which do not form part of disciplinary hearing. He did not provide any explanation as regards the record of work or any reason why it had not been provided.

[20] Subsequent to the Respondent receiving the Notice of Hearing setting the matter down he provided the Board with submissions. Once again those submissions addressed various matters which are not in issue as regards the disciplinary hearing

[3] [2009] 1 NZLR 1

as well as the record of work matter. With regard to the record of work matter he stated he employed two licensed building practitioners "Simon and Roger" to carry out the building work and that he simply managed the project. He stated he did not carry out the work and that the two licensed building practitioners should provide the records of work. He also stated:

> *It is illegal for me to provide a record of work for any restricted building work that I am not to carry out or supervise, or haven't carried out or supervised.*

[21] As a result of this submission the matter was adjourned to allow further evidence to be collected. The Board's further inquiries revealed two other licensed building practitioners were involved in the building work. They described their work as follows:

(a) one stated he was only site for a few days and did some work in relation to a small deck and did not carry out any restricted building work; and

(b) the other was on site for no more than three weeks and helped the Respondent with framing and roof trusses.

Board's Conclusion and Reasoning

[22] 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 work[4].

[23] 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.

[24] The Board discussed issues with regard to records of work in its decision C2-01170[5] 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.

[25] 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).

[26] Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[27] The Respondent has stated that two licensed building practitioners carried out the restricted building work. If this is the case then there would be no case to answer. The additional evidence collected does not, however, support this contention.

[28] One of the identified licensed building practitioners did not carry out any restricted building work. The other did but his evidence was that he did so at the same time as the Respondent which in itself is evidence that the Respondent carried out restricted building work. A record of work should have also been provided by this second licensed building practitioner for the building work he carried out. A record of work should also have been provided by the Respondent.

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[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

[29] As the Respondent has not provided a record of work the disciplinary charge is upheld.

[30] The Board is required to consider whether there is a good reason for not providing a record of work. None has been put forward other than the Respondent's submission that he did not carry out any restricted building work which has been rejected.

Board Decision

[31] 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

[32] 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 Act[i].

[33] The Board's Complaints Procedures allow the Board either to set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.

[34] Given the nature of the disciplinary offending and the level of penalty decided on, the Board has decided to provide an indicative penalty position and provide the Respondent with an opportunity to comment on the level of penalty, costs and on publication prior to making a final decision.

[35] 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.

[36] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[6] 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.*
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> *[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.*

[37] More recently in *Lochhead v Ministry of Business Innovation and Employment*[7], an appeal from a decision of the Board, the court, in respect of penalty noted:

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[6] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[7] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

> *[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.*
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> *[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).*

[38] The Board has to be consistent in its penalty findings. To this end the Board's normal range for record of work matters, which themselves are at the lower end of the disciplinary offending, is generally between a censure at the lower end and a fine of $1,500 at the upper end.

[39] The Board considers the continued refusal to provide a record of work and the attempt to lay the responsibility on others as an aggravating feature. Accordingly, a more rather than less, severe penalty is warranted. Should the Respondent provide a record of work to the owners and the territorial authority prior to the Board making its final decision on penalty, then this will be taken into consideration and a fine will be imposed. If not the Board may consider a period of suspension of the Respondent's licence is required.

Costs

[40] 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."

[41] 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*

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

> *where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."*

[42] 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.

[43] 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 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.*

[44] A submission was made at the hearing that there should not be an order for costs. Reference was made to C2-01170 where no costs were ordered. That case was a seminal case for the Board where the opportunity was used to fully explore records of work. It was on that basis that no costs were ordered.

[45] The Board notes the matter was to be dealt with on the papers. Ordinarily costs for a hearing would be in the order of $1,000 and the Board normally reduces this to $500 when the matter is dealt with on the papers. Notwithstanding that the matter was adjourned to obtain further evidence, the Board has decided that costs will remain at $500 being an amount it 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

[46] 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.

[47] 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.*

[48] 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.

[49] The Board does not consider any further publication is required.

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[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

Submissions on Penalty Costs and Publication

[50] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **23 January 2017**.

[51] If no submissions are received then the Board will make its final decision on penalty, costs and publication.

[52] 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

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

Signed and dated this 21st day of December 2016.

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.