

Before the Building Practitioners Board

	BPB Complaint No. C2-01608
Licensed Building Practitioner:	Ian Blakemore (the Respondent)
Licence Number:	BP 106103
Licence(s) Held:	Brick and Blocklaying AOP Structural Masonry Veneer, External Plastering AOP Proprietary Plaster Cladding Systems

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:	Christchurch
Hearing Type:	In Person
Hearing Date:	23 January 2018
Decision Date:	26 February 2018
Board Members Present:	Chris Preston (Presiding) Mel Orange, Legal Member Brian Nightingale, Registered Quantity Surveyor and Registered Construction Manager Catherine Taylor Faye Pearson-Green, LBP Design AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(c) of the Act.

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Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted Address 1], [Omitted Address 2] and [Omitted Address 3]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); and
 - (b) breached section 314B(a) and/or section 314B(b) of the Act (s 317(1)(h) of the Act).

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

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

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

Background to the Complaint

[5] The Complainant alleged the Respondent had been carrying out external plastering which was restricted building work without the required licence and that he was not competent to carry out such work. The Complainant provided evidence in relation to three properties in [Omitted] being [Omitted Address 1], [Omitted Address 2] and [Omitted Address 3].

Evidence

[6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

[7] The Board heard evidence from:

Ian Blakemore	Respondent
[Omitted]	Complainant
[Omitted]	Licensed Building Practitioner at time of complaint
Gene Moore	Ashburton District Council
[Omitted]	Licensed Building Practitioner
Mike Farrell	Ashburton District Council – Witness for the

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

Respondent

[Omitted]

Masons Plasterbrick Limited – PPCS Supplier

- [8] The Respondent applied for an External Plastering AOP Proprietary Plaster Cladding Systems (PPCS) on 28 February 2017. A licence was granted on 25 March 2017.
- [9] Prior to the Respondent being licenced in External Plastering he employed [Omitted] and assisted him to become licenced in External Plastering. [Omitted] was employed by the Respondent until December 2016 and continued to contract to the Respondent as required through until March 2017. The Respondent worked under the supervision of [Omitted] whilst in his employ and when contracting to him.

[Omitted Address 1]

- [10] The restricted building work took place prior to the Respondent being licenced. A record of work for the restricted building work was provided by [Omitted] who was licensed to carry out the restricted building work at the time. [Omitted] accepted that he had both carried out and supervised the restricted building work at the address.

[Omitted Address 2]

- [11] The Respondent provided a record of work for the external plastering restricted building work dated 19 May 2017. The Respondent admitted that he had carried out external plastering work that was restricted building work at the address prior to him being licensed and that he was not supervised by a licensed building practitioner with the appropriate licence when carrying out that work.

[Omitted Address 3]

- [12] The Respondent provided a record of work for the external plastering restricted building work dated 19 June 2017. The Respondent admitted that he had carried out external plastering work that was restricted building work at the address prior to him being licensed and that he was not supervised by a licensed building practitioner with the appropriate licence when carrying out that work.

Competence

- [13] The Complainant referred to various inspection failures at the addresses as evidence of competence issues. The Ashburton District Council witnesses noted that the failed items related to incomplete work, not to work that was noncompliant.
- [14] The Ashburton District Council witnesses did not consider there were any issues with the Respondent's competence prior to his being licenced. [Omitted] and [Omitted] also spoke highly of the Respondent's competence.

Submissions

- [15] The Respondent submitted that he was placed in a difficult situation in the period between when his relationship with [Omitted] came to an end and his External

Plastering Licence was issued. He noted that he was in the process of being licensed and that his competence in carrying out PPCS was not in question.

Board's Conclusion and Reasoning

- [16] The Board has decided that the Respondent **has** carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act) and should be disciplined.
- [17] The Board has also decided that the Respondent **has not** breached section 314B(a) or section 314B(b) of the Act (s 317(1)(h) of the Act);
- [18] The reasons for the Board's decisions follow.

Not Licensed to Carry Out or Supervise Restricted Building Work

- [19] The Board's findings in relation to section 317(1)(c) only relate to [Omitted Address 2] and [Omitted Address 3]. The Board accepted that the restricted building work at [Omitted Address 1] was carried out and supervised by [Omitted].
- [20] In respect of [Omitted Address 2] and [Omitted Address 3] the Board notes the Respondent's admissions that he had carried out external plastering work that was restricted building work prior to his External Plastering license being issued.
- [21] As noted in the evidence the Respondent was, at the time, licensed in Bricklaying and Blocklaying. The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.
- [22] Licensing classes were created by the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order Design the following are the types of building work each class of licence can carry out:

<i>Licensing class</i>	<i>Type of building work</i>
<i>Trade licensing classes</i>	
<i>External plastering</i>	<i>Application of external solid plaster, or proprietary plaster systems, to any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>

Bricklaying and blocklaying

*Laying or erection of bricks or blocks
for any building that is—*

(a) a category 1 building; or

(b) a category 2 building; or

(c) a category 3 building

- [23] On the basis of the above a licensed building practitioner with a Bricklaying and Blocklaying Licence cannot carry out building work that is the “application of external solid plaster, or proprietary plaster systems” to the primary structure of a house or a small-to-medium apartment building or the external moisture-management system of a house or a small-to-medium apartment building.
- [24] It should be noted, as regards the above, that supervise is a defined term in the Act⁶. The definition is:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out

- [25] It is on the basis of the above reasoning and the Respondent’s admissions that the Board finds that the Respondent has carried out and/or supervised restricted building work that he was not licensed to carry out or supervise.

Misrepresentation or Outside of Competence

- [26] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person’s competence (s 314(b)).
- [27] Misrepresentation under s 314(a) is not defined in the Act so it bears the meaning it has at common law. A misrepresentation is a representation which is false. A representation is a statement which relates to a matter of present or past fact, not one which relates to the future⁷. It is not a statement of opinion⁸ or puffery⁹. A misrepresentation may be express or implied, and may be inferred from acts or conduct as much as from words.
- [28] As regards working outside of one’s competence 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [29] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In

⁶ The terms is defined in section 7 of the Act.

⁷ *Ware v Johnson* [1984] 2 NZLR 518 at 537

⁸ *David v TFAC Ltd* [2009] NZCA 44

⁹ *Dimmock v Hallett* (1866) 2 Ch App 21

this respect it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work, then it may be that they are working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single level dwellings unsuccessfully undertakes a complex multi-level build. Likewise if a licensed building practitioner undertakes work outside of their licence class¹⁰ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the building work is noncompliant or is in some way deficient.

- [30] In the present case the work was there was no evidence that there had been a misrepresentation and the evidence heard was that the Respondent was considered by others in the trade to be competent. It is also noted that within a short period of the external plastering being carried out he was found to be competent and was granted a licence. As such the Board finds that the disciplinary offence has not been committed.

Penalty, Costs and Publication

- [31] 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.
- [32] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [33] 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.

¹⁰ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

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

- [34] 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.
- [35] The Board considered the general circumstances under which the disciplinary offending occurred as mitigation which should be taken into consideration. In the Board's view the breach was of a technical nature and, as the Respondent has been found to have been competent but not licensed during the period in question, it considers that a censure is sufficient penalty.

Costs

- [36] 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."
- [37] 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.
- [38] 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.

- [39] The Board's normal starting point for costs in a case of this nature is \$2,000. However, given the technical nature of the breach and the Board's decision as regards penalty the Board has decided that the Respondent should pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

Publication

- [40] 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:

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

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

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.

- [41] 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.
- [42] 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 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.
- [43] 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.
- [44] Based on the above the Board will not order further publication.

Section 318 Order

- [45] 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.

- [46] 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.

¹⁶ Section 14 of the Act

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

Submissions on Penalty, Costs and Publication

- [47] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **13 March 2018**. 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.

Right of Appeal

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

Signed and dated this 26th day of February 2018



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.*