Before the Building Practitioners Board

	BPB Complaint No. CB24023
Licensed Building Practitioner:	John Campbell (the Respondent)
Licence Number:	BP 109595
Licence(s) Held:	Carpentry and Site AOP 2

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	Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person – Consolidated
Hearing Date:	22 May 2019
Decision Date:	1 July 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
David Fabish, LBP, Carpentry Site AOP 2
Bob Monteith, LBP Carpentry and Site 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)(da)(ii) of the Act.

Contents

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 Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was 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).

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].

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

[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.

Consolidation

[5] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the matters are, in the opinion of the Board, about substantially the same subject matter and the complainant (in respect of a complaint matter) and the licensed building practitioner in respect of each complaint/inquiry agree to the consolidation.

[6] The Board sought and obtained agreement for consolidation of this matter with the following matters:

- Snaith – Board Inquiry CB25032
- Cruickshank – Complaint C2-01916
- Troake – Complaint C2-01912
- Goodman – Board Inquiry CB25033

Evidence

[7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[8] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses.

[9] [Omitted], the head contractor gave further evidence at the hearing.

[10] In this case the Board decided that no further evidence was required. If a Respondent provides further evidence or submissions the Board takes them into account. If they request an in-person hearing this is given consideration.

[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[11] The Board Inquiry resulted from complaints that were made about other licensed building practitioners who had allegedly failed to provide records of work on completion of restricted building work. As part of the investigations into those practitioners the Board resolved to investigate the conduct of the Respondent who was identified as a licensed building practitioner who may also have failed to provide a record of work.

[12] The Respondent was engaged to carry out restricted building work on a new residential build under a building consent. The Respondent's building work started on 23 August 2016 and came to an end on 17 October 2016 when the related contract was brought to an end. His work involved foundations which is restricted building work.

[13] The owner requested a record of work. It was not provided. The owner made a complaint but later sought to withdraw it after a record of work was received. The Board resolved to proceed with the matter as an Inquiry.

[14] The Respondent provided a written response to the Inquiry. He noted that he provided a record of work to the main contractor and that due to a payment dispute with the owner the main contractor had not passed the record of work on to her. He also noted that he had not had any direct contact with the owner and did not know who he would have provided it to. The Respondent accepted that he had received emails from the owner but that he had not opened them, so he was not aware that she was seeking a record of work. A record of work was provided on 30 April 2018.

[15] The Respondent also submitted that the contract had not been validly cancelled, that the main contractor was the agent for the owner and that provision of the record of work to the main contractor met the requirements of the Act.

Board's Conclusion and Reasoning

[16] 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.

[17] 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 work[6].

[18] 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

[6] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

[19] The Board discussed issues with regard to records of work in its decision C2-01170[7] 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.

[20] 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.

[21] 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 …”.

[22] In this instance the head contract came to a premature end and with it the Respondent’s engagement. Completion occurred with the cancellation of the contract in October 2017 as, at that point in time, the Respondent would not be carrying out any further restricted building work. Requests for a record of work were made and refused. A record of work was not provided until late April 2018. It was not provided to the owner or the territorial authority. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[23] 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.

[24] The Board received evidence that the main contractor was acting as the agent. No supporting evidence of this was received. The Board does note that it is common in the building industry for an owner to appoint an agent to act on their behalf. Usually this is an express provision in their contractual relationship or, at times, it may be implied by the nature of the relationship between the owner and the agent and the conduct of the agent. The question for the Board is whether the licensed building practitioner’s obligation to provide a record of work to the owner is satisfied where it is provided to the owner’s agent.

[25] From a practical view point it makes sense to allow an agent to receive or collect records of work on the owner’s behalf. For example, various licensed trades on a

[7] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

building site may not have a relationship with the owner and might be dealing almost exclusively with the person who is acting as their agent. In such circumstances it would be reasonable for them to provide the record of the work to the agent and for the agent in turn to provide it to the owner.

[26] Where an agent does receive a record of work in a timely manner then it would be reasonable to say that the licensed building practitioner has fulfilled their obligation. However, if the agent is a licensed building practitioner who has carried out restricted building work then they cannot rely on their being the owner's agent and simply provide it to themselves. Their obligation lies to the actual owner.

[27] It should also be noted that the option of providing a record of work to the agent can be displaced by the owner requiring that it be provided directly to them as well as to the territorial authority. This is what occurred in the present case. A direct request was made and a record of work was not provided.

[28] In this instance there was an ongoing dispute with the head contractor. 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.

[29] It has also been submitted that the record of work was provided to the owner's agent. An agency can be displaced by direct requests which were made and ignored. Moreover, the agency did not extend to the territorial authority.

[30] It is also noted that whilst the Respondent was not aware of the details of the owner the same does not apply to the territorial authority. The Respondent had a duty to also provide it with a record of work. There was no reason why he could not do so.

Post Hearing Submissions

[31] Following the completion of the hearing the Respondent sought to submit further evidence and submissions. Whilst these would not ordinarily be received the Board has reviewed them and has noted that there are no matters raised that would result in the Board changing its decision. Of particular note the Respondent has submitted that as no code compliance certificate has been applied for there is no requirement to provide a record of work. The requirement to provide a record of work is not triggered by an application for a code compliance certificate but by completion of a licensed building practitioner's restricted building work. It is also to be noted that the failure to provide a record of work is not a ground for refusal to provide a code compliance certificate[8].

[8] Refer MBIE Determination 2013/030, 28 May 2013 where the determination held that a record of work has nothing to do with the code-compliance of the work and whether the work that has been carried out complies with the building consent.

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 Act[i], 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 at a hearing. Included in the evidence received 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*[9] 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*[10] 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. The Board penalty decision in this case under section 318(1)(d) of the Act is that the Respondent be censured. The Board considered that censure was appropriate given the mitigating circumstances present. A censure is a formal expression of disapproval.

Costs

[37] 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."

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

[10] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[38] 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[11].

[39] In *Collie v Nursing Council of New Zealand*[12] 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.*

[40] 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 decided that no costs will be ordered on this occasion given the unique circumstances of the case.

<u>Publication</u>

[41] 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[13]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

> *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

[42] 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.

[43] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[14]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[15]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[16]. 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*[17].

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[11] *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.
[12] [2001] NZAR 74
[13] Refer sections 298, 299 and 301 of the Act
[14] Section 14 of the Act
[15] Refer sections 200 and 202 of the Criminal Procedure Act
[16] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[17] ibid

[44] 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 interest[18]. 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.

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

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.**

Costs: **No costs are ordered under section 318(4) of the Act.**

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.

[47] 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

[48] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **23 July 2019**. 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.

[49] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

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

Right of Appeal

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

Signed and dated this 1st day of July 2019

Chris Preston
Presiding Member

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[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.