

Before the Building Practitioners Board

	BPB Complaint No. BP25231
Licensed Building Practitioner:	Michael Gallagher (the Respondent)
Licence Number:	BP 131125
Licence(s) Held:	Carpentry

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	Auckland
Hearing Type:	In Person
Hearing Date:	17 December 2019
Decision Date:	27 February 2020

Board Members Present:

Chris Preston (Presiding)
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2
Rob Shao, LBP, Carpentry Site AOP 1

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	2
Function of Disciplinary Action	2
Inquiry Process	3
Evidence	4
Board’s Conclusion and Reasoning	5
Record of Work.....	5
Disrepute.....	6
Penalty, Costs and Publication	7
Penalty.....	7
Costs.....	8
Publication.....	9
Section 318 Order	9
Submissions on Penalty, Costs and Publication	10
Right of Appeal	10

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] Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) 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
 - (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act), in that, he may have fraudulently obtained a payment for materials which were not supplied.

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

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

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] In a similar vein the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [5] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.
- [6] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [7] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges and it decides what evidence is required at a hearing to assist it in its investigations. In this respect the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is

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 *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

- [8] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.

- [10] 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. The hearing is not a review of all of the available evidence.

- [11] The Respondent did not respond to the complaint, has made no submissions for hearing, has in no way engaged with the process and did not attend the hearing.

- [12] In addition to the documentary evidence before the Board heard evidence at the from:

[Omitted]

[Omitted]

[Omitted]

[Omitted]

- [13] The complaint related to the construction of a new residential dwelling under a building consent. A quote for the work was provided by the Respondent but no formal contract was entered into. The value of the quote was \$144,000.

- [14] As part of the complaint the Complainant made an allegation that the Respondent had cheated them out of money and had not paid subcontractors. No further evidence was received at the hearing to substantiate the allegation.

- [15] Not all of the work was completed prior to a dispute over final payment which saw the Respondent leave the job. He was not able to be contacted from that point on with regard to the completion of the building work.

- [16] The work that was carried out started on or about 21 September 2019 and came to an end on or about 25 May 2019. No further building work was carried out after that date. A record of work for the Respondent's restricted building work was not provided.

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [17] The building owners, after many attempts to contact the Respondent, engaged another builder to fix issues with the wall linings and the installation of the kitchen, bathroom and painting.
- [18] Many attempts were made to get a record of work from the Respondent, but none was provided to the owner or the territorial authority.

Board's Conclusion and Reasoning

- [19] 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.
- [20] The Board has also decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [21] The reasons for the Board's decisions follow.

Record of Work

- [22] 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 work⁷.
- [23] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.
- [24] The Board discussed issues with regard to records of work in its decision C2-01170⁸ 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.
- [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 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.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [26] 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 ...”.
- [27] 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. Completion occurred in or about May 2019. A record of work has not been provided. 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.
- [28] 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.
- [29] The Respondent may not have realised that the Complainant had been requesting the record of work. The requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations.

Disrepute

- [30] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111⁹ and discussed the legal principles that apply.
- [31] The Act does not define conduct which brings or is likely to bring the regime into disrepute. The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”¹⁰ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹¹ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹²

⁹ Board decision dated 2 July 2015.

¹⁰ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹¹ [2012] NZCA 401

¹² [2012] NZAR 1071 page 1072

[32] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions¹³;
- honest mistakes without deliberate wrongdoing¹⁴;
- provision of false undertakings¹⁵; and
- conduct resulting in an unethical financial gain¹⁶.

[33] In this case there was an allegation of unethical financial gain but insufficient supporting evidence for the Board to uphold the ground of discipline. Moreover, while the conduct of the Respondent fell short of what would be expected of a professional in this case the Board did not consider it met the high threshold required to make a finding. In this respect the Board notes the Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

[34] The Board does make comment however that the Respondent should make sure he understands his obligations under the Building Act to provide a contract for all work over \$30,000. He should also note that there is an ethical obligation as well as a legal obligation under Part 4A of the Act that he will keep the client aware of cost changes (variations), work progress, changes in design and to engage with clients in a professional manner.

Penalty, Costs and Publication

[35] 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.

[36] As the Respondent did not appear at the hearing 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

[37] 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

¹³ *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

¹⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁵ *Slack, Re* [2012] NZLCDT 40

¹⁶ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁷ 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.

- [38] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ 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 do 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.
- [39] 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. There are no aggravating nor mitigating factors present. As such the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

Costs

- [40] 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."
- [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 case¹⁹.
- [42] In *Collie v Nursing Council of New Zealand*²⁰ 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.*
- [43] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁹ *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.

²⁰ [2001] NZAR 74

Publication

[44] 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 Act²¹. 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.

[45] 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.

[46] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. 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*²⁵.

[47] 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 interest²⁶. 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.

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

Section 318 Order

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

Penalty: Pursuant to section 318(f) of the Building Act 2004, the Respondent is ordered to \$1,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

[50] 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

[51] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 20 March 2020. 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.

[52] 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.

Right of Appeal

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

Signed and dated this 27th day of 2020



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*

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- (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.*