

Before the Building Practitioners Board

	BPB Complaint No. CB25203
Licensed Building Practitioner:	Simon Kaye (the Respondent)
Licence Number:	BP 130630
Licence(s) Held:	Bricklaying and Blocklaying (Structural Masonry and Veneer)

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	Wellington
Hearing Type:	In Person
Hearing Date:	12 February 2020
Decision Date:	10 March 2020

Board Members Present:

Mel Orange, Legal Member, Deputy Chair (Presiding)
Richard Merrifield, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP, Carpentry and 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.

The Respondent **has not** committed a disciplinary offence under section 317(1)(b) 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]*. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, the Respondent may have carried out building work that did not meet quality and/or compliance requirements. In this respect the Board’s inquiries will focus on the issued noted in a report by *[Omitted]* and Brick (Board File reference 2.1.13) and the *[Omitted]* report number 19/008 dated 21 May 2019 (Board File page 100); and/or
- (b) 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) of the Act contrary to section 317(1)(da)(ii) of the Act, IN THAT, he may not have provided a record of work within a reasonable time frame after completion;

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] 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

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

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 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] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|------------------|----------------------------|
| Simon Kaye | Respondent |
| <i>[Omitted]</i> | Witness for the Respondent |
| <i>[Omitted]</i> | Witness by phone |
- [12] The Respondent was engaged on a labour only basis to carry out the construction of a brick veneer on a new residential dwelling. The building work was carried out under a building consent and as such it was restricted building work for which a record of work must be provided on completion.
- [13] The brick that had been specified and supplied by the Complainant, a Midland Euro Brick, was white in colour and a white mortar was used with it. The Complainant raised issues with the visual appearance of the brickwork post completion. He engaged *[Omitted]* to provide a report on the quality and compliance of the brickwork. *[Omitted]* provided a report to the Complainant which formed part of the complaint to the Board. The report noted two compliance issues (raking of joints to seal them and the pitch of door sills) as well as aesthetic and workmanship issues. The Complainant also complained about brickwork not being plumb.
- [14] At the hearing *[Omitted]*, who the Board accepted was an expert in his field, confirmed his report. He noted that light reflection issues will occur with the type

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

and colour of brick specified. He was asked to assess the seriousness of the compliance issues he had noted. He stated that, as the bricks were on a cavity and were only performing as a rain screen, they were not, from a compliance perspective, serious. He noted that the issues were still contrary to the standards that are to be applied when carrying out brickwork. *[Omitted]* was also asked about the overhang of the bricks over the foundation. He stated there was sufficient brick over the foundation and that it was therefore not a compliance issue. *[Omitted]* stated that the main issue with the brickwork was the aesthetic look of it.

- [15] The Respondent acknowledged the items raised in *[Omitted]*'s report and stated that he had learnt from the complaint as regards the raking of joint. He considered the aesthetic issues related to the type of brick selected and supplied by the Complainant which reflects light and exaggerates issues in certain lighting conditions. He noted that it was not until light seasonal light conditions changed that the Complainant started raising issues with the brickwork.
- [16] The Respondent also gave evidence that there were issues with the dryness and density of the bricks and with the mortar used. He did a site mix mortar. He found it difficult to get a mix that would dry and set at the correct rate given the dryness of the brick being used. He sought advice from colleagues and from the supplier who was not able to assist. The bricks did not have any manufacturer's instructions or specifications.
- [17] The Respondent called *[Omitted]* to provide expert evidence in support of his submission. *[Omitted]* was accepted by the Board as an expert. She provided a report she had completed. She noted that the brick was manufactured in Europe and was more tile like in nature in that it was less porous than local bricks. It tended not to draw water out of the mortar creating issues with the setting of the mortar. She recommends the use of an accelerator in such circumstances.
- [18] The Respondent also noted that he checked the brickwork with a 3-metre straight edge and that the work was within tolerance. He put the issue to *[Omitted]* who stated the western side was on the limit of the allowed tolerances but that there were no issues with the other walls.
- [19] The Respondent and *[Omitted]* gave evidence as regards the Respondent having joined the *[Omitted]* since the complaint and of his engagement with the organisation to both learn and to assist others.
- [20] With regard to the record of work the Respondent stated that he considered he may have been going back to do more work, so he had not provided a record of work as completion had not occurred. As part of the investigation process the Board was provided with a record of work dated 24 March 2019. It had been provided to the owner on 14 May 2019. It was not provided to the territorial authority. The complaint was made to the Board on 6 May 2019. An email from the Respondent to the Complainant dated 7 May 2019 noted that the record of work would be provided once payment was made.

Board's Conclusion and Reasoning

- [21] 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)
- [22] The Board has also decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [23] The reasons for the Board's decisions follow.

Record of Work

- [24] 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.
- [25] 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.
- [26] 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.
- [27] 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.
- [28] 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 ...". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*⁹ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".
- [29] As to when completion will have occurred is a question of fact in each case.

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

⁹ [2018] NZHC 1662 at para 50

- [30] 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.
- [31] In the present case the Board finds that completion occurred on or about 24 March 2019, the date of the record of work. The record of work was not provided until 14 May 2019 and then only after a complaint had been made and only to the owner. 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.
- [32] 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.
- [33] In this instance there was an ongoing payment dispute. 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.
- [34] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [35] The Respondent should also note that whilst it may be common practice in some quarters of the building industry for records of work to be provided to main contractors it is a practice that carries with it the risk that the record of work will not be passed on to the required recipients, the owner and the territorial authority. This can occur for a variety of reasons, including as a result of a contractual dispute. If a main contractor does not pass a record of work on to the final recipients it is the author of the record of work that will be held accountable by the Board, not the person or entity that they entrusted to fulfil their statutory obligation.

Negligence and/or Incompetence

- [36] The Board decided that the Respondent has not carried out building work in a negligent or incompetent manner on the basis that the disciplinary offending was not serious enough to warrant a disciplinary outcome.
- [37] In this respect the Board did note that there were quality and compliance issues but that in various cases, including *Collie v Nursing Council of New Zealand*¹⁰ the Courts have stated that it is only the most seriousness of conduct that will warrant a disciplinary outcome. In *Collie* the High Court stated:

¹⁰ [2001] NZAR 74

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[38] Again in *Pillai v Messiter (No 2)*¹¹ the Court of Appeal stated:

... 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.

[39] The Board noted that *[Omitted]* had stated the compliance contraventions were not serious. The Board also noted that there were issues with the brick and the mortar that the Respondent tried to resolve. It noted these were unusual. It did not consider that a reasonable licensed building practitioner would necessarily been aware of the issues or how to deal with them.

[40] As noted in the introduction to this decision the Board cannot deal with commercial or contractual matters. The same applies to aesthetic issues unless those issues relate to workmanship. Again, the Board finds that whilst there were some workmanship issues that contributed to the look of the brickwork it finds that the main causative factor was the type of brick used.

Penalty, Costs and Publication

[41] 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.

[42] The Respondent made submissions at the hearing as regards penalty, costs and publication. The submissions included that the Respondent had incurred a financial loss and that he has undertaken training since the matter occurred.

Penalty

[43] 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*¹² 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:

¹¹ (1989) 16 NSWLR 197 (CA) at 200

¹² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[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.

- [44] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹³ 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.
- [45] 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 mitigating factors including that the record of work was provided within a short period of completion. Given this the Board has decided that it will censure the Respondent. A censure is a formal expression of disapproval.

Costs

- [46] 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."
- [47] 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 case¹⁴.
- [48] In *Collie v Nursing Council of New Zealand*¹⁵ 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.*
- [49] The Board would normally order costs in the range of \$3,000-\$3,500 for a hearing of this type. It notes, however, that the Respondent was partially successful in his defence. As such it has decided to treat the question of costs as if the hearing was a record of work matter. On this basis the Board's costs order is that the Respondent is to pay the sum of \$750 toward the costs of and incidental to the Board's inquiry.

Publication

- [50] 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

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

¹⁴ *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.

¹⁵ [2001] NZAR 74

Building Practitioners' scheme as is required by the Act¹⁶. 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.

- [51] 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.
- [52] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁸. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁹. 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*²⁰.
- [53] 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 interest²¹. 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.
- [54] Based on the above the Board will not order further publication.

¹⁶ Refer sections 298, 299 and 301 of the Act

¹⁷ Section 14 of the Act

¹⁸ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁰ *ibid*

²¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[55] 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: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (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.

[56] 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.

Right of Appeal

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

Signed and dated this 10th day of March 2020



Mel Orange
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:

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- (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.*