

Before the Building Practitioners Board

	BPB Complaint No. CB25556
Licensed Building Practitioner:	Jason King (the Respondent)
Licence Number:	BP 110704
Licence(s) Held:	Roofing – Liquid Membrane Roof, Torch on Roof Membrane

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	Whangarei
Hearing Type:	In Person
Hearing Date:	30 June 2021
Decision Date:	14 July 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mr R 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.

Disciplinary Finding:

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

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Summary of the Board’s Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$500.

The Hearing

- [2] The Board, on receiving a Registrar’s Report in respect of the matter, reviewed the file and decided to deal with it by way of a Draft Decision.
- [3] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.

The Charges

- [4] The hearing resulted from a complaint about 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 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).

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

- [5] 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.
- [6] 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.”

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 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 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.
- [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.

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

- [11] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent and the Complainant.
- [12] The Respondent was engaged to carry out building work on a residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion.
- [13] The Respondent's building work (waterproofing of a deck) started on or about 9 June 2019 and came to an end on or about 12 June 2019. A record of work dated 14 February 2020 was provided to both the Complainant and the Territorial Authority in February 2020.
- [14] Further work to the deck was required as a result of penetrations through the torch on membrane after the work to which the 14 February 2020 record of work related to had been completed. A commercial dispute arose over responsibility for the work.
- [15] On 9 June 2020, the Respondent returned to the site and carried out remedial work. The building consent issued for the building work was still in place. A code of compliance certificate had not yet been issued.
- [16] On 23 June 2020, the Respondent contacted the Territorial Authority and cancelled the 14 February 2020 record of work.
- [17] On 1 July 2020, the Complainant made a complaint to the Board.
- [18] The Respondent provided a response to the complaint. He noted, as regards records of work:
- | | |
|-----------------|---|
| <i>Issue 8</i> | <i>True, PS3 and ROW withdrawn. Due to alteration, new paperwork required.</i> |
| <i>Issue 9</i> | <i>False PS3 and ROW issued is no longer valid for altered deck.</i> |
| <i>Issue 10</i> | <i>False PS3 and ROW withdrawn as is no longer valid for alterations. No confidence in [Omitted] undertaking more alteration to building work as he is main contractor. We have charged on hourly rate (\$75) plus material and travel as Job is 45 mins away. Intimidation is merely [Omitted]'s interpretation.</i> |
- [19] The Complainant and the Respondent are in dispute over the costs of the remedial work undertaken.
- [20] At the hearing, the Respondent re-stated that he had withdrawn the original record of work because he had undertaken significant remedial work
- [21] He stated that he did not provide a second record of work because he did not trust the Complainant and could not be sure that other people had not worked on the deck and, in some way, compromised or changed the work he had done.

- [22] After the hearing the Respondent did provide a copy of a second record of work. It had a new date in the top right corner of 28 October 2020. It was a copy of the original record of work dated the 14 February 2020.

Board's Conclusion and Reasoning

- [23] 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.
- [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 work⁶.
- [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 C2-01170⁷ 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*⁸ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

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

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

⁸ [2018] NZHC 1662 at para 50

- [29] As to when completion will have occurred is a question of fact in each case. 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.
- [30] In the present matter, completion of the initial work occurred in June 2019. A record of work was not provided until February 2020, over six months after the work had been completed. Whilst the Complainant did not complain about the provision of that record of work, it was not within the time frames envisaged by section 88(1) of the Act.
- [31] The Respondent then sought to withdraw his record of work due to his concerns about building work that had taken place after he had completed the membrane. That was not the correct course of action.
- [32] A record of work is not "sign off" of the work. Nor is it to be equated with a producer statement. A record of work is simply a statement as to who did or supervised what in the way of restricted building work. It is not a statement as to the quality or compliance of restricted building work. If the Respondent had issues with what occurred after he had completed the membrane, he could have withdrawn his producer statement or filed a notice with the Council noting his concerns. He could not alter the fact that he had done the original membrane and as such could not withdraw the record of work that recorded that fact.
- [33] Putting that matter aside, the Respondent then carried out further restricted building work whilst the building consent was still in place. This was when he carried out remedial work on the deck. As such, a further record of work recoding it was required. It should have been provided to the owner and to the territorial authority. That did not occur and, on this basis, the Board finds that a record of work was not provided on completion as required. The disciplinary offence has been committed.
- [34] 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.
- [35] The Board notes that there was an ongoing payment dispute. Whilst this was not raised as a direct reason for non-provision, the Board does remind the Respondent that it has 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.
- [36] 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.

Penalty, Costs and Publication

- [37] 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.
- [38] 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

- [39] 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.

- [40] 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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [41] 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, an amount which it considers will deter others from such behaviour. 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

- [42] 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.”

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

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

- [43] 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 case¹¹.
- [44] 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.*
- [45] The Board notes the matter was originally dealt with on the papers. The Board invited the Respondent to present his submissions on the Draft Decision in person. Given those circumstances, the Board has decided that it will keep the level of costs at that was indicated in the Draft Decision being \$500. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [46] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act¹³. 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.*
- [47] 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.
- [48] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990¹⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁶. The High Court provided

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

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁷.

[49] 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 interest¹⁸. 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.

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

Section 318 Order

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

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

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(l)(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.

[52] 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

[53] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **31 August 2021**. 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.

[54] 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/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

¹⁷ *ibid*

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

Right of Appeal

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

Signed and dated this 10th day of August 2021



Mr C 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.*