

Before the Building Practitioners Board

	BPB Complaint No. CB24541
Licensed Building Practitioner:	Wei Qu (the Respondent)
Licence Number:	BP 100479
Licence(s) Held:	Carpentry and Site AOP 1

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:	19 March 2019
Decision Date:	1 April 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
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	2
Function of Disciplinary Action	2
Evidence	3
Board’s Conclusion and Reasoning	5
Penalty, Costs and Publication	7
Penalty	7
Costs.....	7
Publication	8
Section 318 Order	9
Submissions on Penalty, Costs and Publication	9
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]. 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.

[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:

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

⁴ [2016] HZHC 2276 at para 164

“... 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.

Evidence

- [5] 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.
- [6] 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.
- [7] 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. The Respondent requested that he be allowed to appear and be heard. The Board granted the request and provided an interpreter.
- [8] The building work to which the complaint related was an extension to an existing residential dwelling. The building work was carried out under a building consent. It included restricted building work.
- [9] The Respondent supervised some of that restricted building work. His response and submissions noted he supervised the project managers staff who carried out the installation of framing and trusses.
- [10] The owner complained that a code compliance certificate could not be issued because a record of work had not been provided by the Respondent.
- [11] The Respondent emailed the Board on 27 February 2019 in advance of the hearing. He stated:

[Omitted] is the Project Manager responsible for [Omitted] property at [Omitted]. On June 2018, [Omitted] asked me to supervise his builder's work in relating to all the pre-nial timber framing on the right place and all the fixing all right, timber trusses fixing is good.so I went on and compete the supervision job on October 2018 (In fact, I have 4 times visits, including 2

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

times do the inspection those framing inspection and final inspection)and helped [Omitted] to pass the relevant council inspection only in relating to timber works.

The registrar considers that if the Board decides to proceed to hearing, possible discipline should apply under section 317(1)(da)(ii)for not providing a record of works on completion.

This is not the case, I have provided my signed PS3 on relevant portion of work to the then site manager [Omitted] on completion of my supervision works. On reflection, Should have kept a record of this and handed over a copy to the owner on request. However I couldn't have known back then that [Omitted], as a representative of the owner, would not pass on my signed PS3 to the owner due to possibly other contractual issues.

- [12] The Respondent made a similar response to the complaint when it was first brought to his attention. He stated he supervised and helped the builder pass inspections which was why his name was on council records. He noted that he had contacted the owner who had said that [Omitted] had not given her all the documents required to obtain a code compliance certificate.
- [13] At the hearing the Respondent was asked who had the record of work. The Respondent was not able to answer the question. Rather he referred to providing a producer statement. He was questioned as to his understanding of what a record of work was and what his obligations with regard to them were. He was not able to answer the questions. He did not display any knowledge of the regulatory provisions with regard to records of work or his obligations as regards them.
- [14] After the hearing had closed the Respondent attempted to state that he had in fact done a record of work and had given it to [Omitted]. He said he did not keep a copy. He was offered the opportunity to provide further evidence in the way of the record of work by no later than 22 March 2019. An email with a record of work dated 22 March 2019 was received. The email stated:

I would like to explain my misinterpreting to the question about record of building work in the hearing held on 19/03/2019.

No doubt for all the building projects I have participated I have completed a record of building work (PS to me previously) on completion of my building work as required. Because personally I have always called it PS, when I was asked the question my answer was I have provided a PS for this project. When I was told PS is a different document I got confused as "PS" is the only document I have signed for this project. By then I didn't realize my "PS" and record of building work are the same thing. I should have clarified the question more. If I had requested to check the document shown to me by details rather than judged it only by colour in a distance I wouldn't have made such a ridiculous mistake. Now I can confirm that I completed a record of

building work for [Omitted] on completion of my building work soon after the final inspection and gave it to [Omitted] (Project manager of this project) at the time. I neither had intention nor have refused the owner to provide my relevant document. However, as a LBP I should have known the document name clearly and will take your advice to study the LBP handbook to sharpen my professional knowledge.

After receiving the complaint, I contacted the owner and met her for a discussion. I expected the owner had got my document from [Omitted]. I thought that she complained me only for not providing her other contractors' documents. I explained to her why I should not be responsible for other contractor's documents beyond my work. Then she expressed her understanding of my explanation and told me that she would withdraw the complaint against me later. So I believed that the owner had got my document.

In February I have tried to get a copy of my record of work from council but no response from council as a wrong direction given by council customer service staff. After the hearing on 19/03/2019 I went back to council again to get a copy of my record of work. This time a council staff helped me in a right direction so that I was able to go through the CCC application file with a council officer. Surprisingly my record of work is not in the file. I don't know why my record of work hasn't been submitted to council by the owner. No matter what reasons behind I'll help the owner to sort out the issue. I have tried to contact [Omitted] to get my signed copy from him but can't get in touch with him. I have done a new record of work as attached and will provide it to the owner ASAP.

Board's Conclusion and Reasoning

- [15] 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.
- [16] 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.
- [17] 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.

- [18] 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.
- [19] 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.
- [20] 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 ...”.
- [21] The Board finds that the Respondent has not completed a record of work as per the above requirements. It does not accept nor believe his explanation that he had confused a producer statement and a record of work. The Board considers the excuse was crafted once the Respondent understood what a record of work was and what his obligations were.
- [22] The Board finds that the Respondent may well have provided a producer statement. Doing so does not alleviate the requirement to provide a record of work to the owner and the territorial authority. They are different documents with different purposes.
- [23] Furthermore, even if the Respondent did provide a record of work to the main contractor or project manager (which the Board does not believe he did) then he would still not have satisfied the requirements of section 88 of the Act. The obligation is to provide the record of work to the owner and the territorial authority. Moreover, the owner approached the Respondent for a record of work and even at that point in time he did not avail himself of the opportunity to provide a record of work.
- [24] The Respondent should 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. They must act of their own accord and not wait for others to remind them of their obligations.
- [25] 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

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

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. No good reasons were put forward.

Penalty, Costs and Publication

- [26] 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.
- [27] The matter was dealt with at a hearing. Before the Board 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

- [28] 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*⁸ 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.

- [29] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁹ 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.
- [30] 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 noted that the Respondent's regulatory knowledge was lacking and that he was seemingly unaware of his obligations. It sees no reason to reduce the level of the fine.

Costs

- [31] 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."

⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

[32] 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 case¹⁰.

[33] In *Collie v Nursing Council of New Zealand*¹¹ 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.

[34] The Board notes the matter was to be dealt with on the papers. The Respondent required a hearing. Ordinarily costs for an on the papers hearing would be \$500 and amount which recognises the efficiencies of the process. As a hearing was required the costs were greater. As such the costs are set at \$750 an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[35] 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 Act¹². 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.

[36] 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.

[37] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁵. The High Court provided

¹⁰ *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.

¹¹ [2001] NZAR 74

¹² Refer sections 298, 299 and 301 of the Act

¹³ Section 14 of the Act

¹⁴ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁵ *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*¹⁶.

[38] 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 interest¹⁷. 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.

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

Section 318 Order

[40] 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 \$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.

[41] 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

[42] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **29 April 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.

[43] 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.

¹⁶ *ibid*

¹⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 1st day of April 2019



Richard Merrifield
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.*