

Before the Building Practitioners Board

	BPB Complaint No. CB25344
Licensed Building Practitioner:	Yixing Yuan (the Respondent)
Licence Number:	BP 120467
Licence(s) Held:	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	Wellington
Hearing Type:	In Person
Hearing and Decision Date:	29 July 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Richard Merrifield, LBP, Carpentry and Site AOP 2
Robin Dunlop, Retired Professional Engineer
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)(db) 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 held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) 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] In a similar vein, the Board’s investigation and hearing process are 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 is important to note as, on the basis of it, the 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 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

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

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

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:

Yixing Yuan	Respondent
<i>[Omitted]</i>	Complainant
<i>[Omitted]</i>	Complainant

[12] The Respondent was engaged to carry out building work on an existing residential dwelling under a building consent.

[13] The Board was provided with copies of the building consent plans. A review of those plans shows that aspects of the building work to be carried out related to weathertightness and to structural elements. In particular, the installation of:

- (a) exterior window joinery; and
- (b) floor joists and plywood flooring.

[14] Building work on structural and weathertightness elements under a building consent is restricted building work that must be carried out by a licensed building practitioner with the appropriate class of licence.

[15] The Respondent holds a Site Area of Practice 1 licence. He was not the on-site builder. An unlicensed person was on-site carrying out the work under the direction of the Respondent. The Complainant, when she became aware that an unlicensed person was carrying out the work, made enquiries of the on-site person. The Complainant was informed that the builder on-site does the on-site work and that the Respondent then gets an authorised person to sign off the work. The Complainant put a stop on the work when advised of this. Very little work had been carried out at that time.

[16] The Complainant's partner stated, in an email dated 26 November 2019:

On the day the builder signed the contract he stated verbally he would supervise and carry out work on site. This was around the beginning of July 2019. He also produced a copy of his licence and said he was authorised.

[17] The Complainant subsequently engaged another licensed building practitioner who carried out and completed the building work.

- [18] The Respondent did not initially respond to the complaint. He did, after the matter had been set down for a hearing, respond to the commercial matters raised in the complaint.
- [19] At the hearing, the Respondent gave evidence that he did show his licence card and state that he would supervise the building work and would organise and get a code of compliance certificate.
- [20] The Respondent stated that he had, when he had become licensed, applied for both Carpentry and Site licence. He was granted a Site AOP 1 licence. A search of his licensing records showed that he had been declined a Carpentry licence.
- [21] The Respondent’s evidence was that he was operating under the belief that his Site licence allowed him to supervise restricted building work. He noted that he had been given advice when he was granted his Site licence that a Site licence would allow him to continue with the work that he was doing which was more on the management side of building work.

Board’s Conclusion and Reasoning

- [22] The Board has decided that the Respondent **has** held himself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he was not licensed to carry out or supervise (s 317(1)(db) of the Act) and **should** be disciplined.
- [23] The intended building work included restricted building work in that it was to be carried out under a building consent, and it involved structural and weathertightness elements⁷. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [24] The Respondent is a licensed building practitioner with a Site licence.
- [25] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order the following are the types of building work each class of licence can carry out. A Site Licence is designated as a General Class of Licence. This compares to Carpentry which is a Trade Licensing Class. The following is the comparative provisions for each:

<i>Licensing class</i>	<i>Type of building work</i>
<i>General Licence Classes</i>	

⁷ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) defines what is restricted building work. The work described in the complaint came within one or more of those definitions.

<i>Site</i>	<i>Co-ordination or oversight of some or all of the construction or alteration of any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>
<i>Trade Licensing Classes</i>	
<i>Carpentry</i>	<i>Carpentry for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>

- [26] On the basis of the above, a licensed building practitioner with a Site Licence cannot carry out or supervise restricted building work that is the construction or alteration of the primary structure of a house or a small-to-medium apartment building or the external moisture-management system of a house or a small-to-medium apartment building. Their role is limited to that of co-ordination and oversight. It does not extend to supervision as supervise is a defined term in the Act⁸.
- [27] The Respondent's evidence was that he understood that he could supervise. He was operating under a mistaken belief. It is noted, however, that the information available to applicants, at the time the Respondent applied to be licensed, made it clear that a Site licence holder could not supervise restricted building work. The Respondent should also note that ignorance of the law is not a defence.
- [28] Given the above, the Board has decided that the Respondent was representing or holding himself out as the person who could and would carry out or supervise the restricted building work when he was not licensed to do so.

Penalty, Costs and Publication

- [29] 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.
- [30] The Board dealt with penalty, costs and publication at the hearing.

⁸ The terms is defined in section 7 of the Act.

Penalty

[31] 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.

[32] 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.

[33] The Board accepted that the Respondent was operating under a genuine mistake. Evidence was also received from him to the effect that most of his work was in the commercial building sector where a licence is not required.

[34] On the basis that it was a genuine mistake, the Board decided that a censure will suffice. A censure is a formal expression of disapproval. The Respondent should note that any further offending of the same nature will not be dealt with so lightly.

[35] The Board recommended that the Respondent obtain his carpentry licence if he wanted to carry out or supervise restricted building work in the future.

Costs

[36] 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."

[37] 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.

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

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

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.

[38] 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.

[39] 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. The amount of costs ordered is significantly less than 50% of the actual costs incurred.

Publication

[40] 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.

[41] 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.

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

[43] 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.

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

¹² [2001] NZAR 74

¹³ Refer sections 298, 299 and 301 of the Act

¹⁴ Section 14 of the Act

¹⁵ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁷ *ibid*

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

Section 318 Order

[45] 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 \$1,000 (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.

[46] 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

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

Signed and dated this 10th day of August 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*
 - (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:*

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- (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.*