

Before the Building Practitioners Board

	BPB Complaint No. CB25263
Licensed Building Practitioner:	Haifeng Zhong (the Respondent)
Licence Number:	BP 123601
Licence(s) Held:	Carpentry and Site AOP1

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	Board Inquiry
Hearing Location	Wellington
Hearing Type:	On the Papers
Hearing Date:	1 October 2019
Draft Decision Date:	2 December 2019
Final Decision Date:	4 March 2020

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP, Design AOP 2
Rob Shao, LBP, Carpentry Site AOP 1

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

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

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Introduction

- [1] On 1 October 2019 the Board received a Registrar’s Report in respect of a Board Inquiry into the conduct of the Respondent.
- [2] Under regulation 22 of the Complaints Regulations the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 21 of the Complaints Regulations applies.
- [3] Having received the report the Board decided that regulation 21 did not apply. Under regulation 22 the Board is required to hold a hearing.
- [4] The Board’s jurisdiction is that of an inquiry. Board Inquiries are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such it may depart from its normal procedures if it considers doing so

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.

- [5] In this instance the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [6] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. The Respondent will be provided with an opportunity to make comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [7] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had 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

- [8] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [9] 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*⁵ 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."*
- [10] 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.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

Evidence

- [11] 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.
- [12] The Board Inquiry resulted from a complaint made to the Board about another licensed building practitioner for failure to provide a record of work. The investigations into that matter identified that the Respondent who also carried out or supervised building work on a new residential build under a building consent may have also failed to provide a record of work for his restricted building work.
- [13] Building work started in August 2016 and came to an end in August 2018. The Respondent stated that he carried out cladding work, which is restricted building work, but that he was supervised by another licensed person and he did not consider that he was doing the work under his licence. He noted that if he was responsible for the work then he would provide a record of work.
- [14] The building consent authority file confirmed that the Respondent was noted as a carpenter on site. An inspection dated 30 November 2017 noted that he was present at a cladding inspection and that his licence was sighted.

Draft 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 work⁷.
- [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 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 C2-01170⁸ 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

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

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

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 Respondent has submitted that he was working under the supervision of another licensed person and as such he was not the licensed building practitioner who should be providing a record of work.

[20] The Board is aware that, in some quarters, it is common practice for one licensed building practitioner to provide a record of work for all restricted building work completed within their class of licence where in fact more than one licensed building practitioner has actually carried out restricted building work. Such a practice does not reflect the provisions of section 88(1) of the Act which states:

“Each licensed building practitioner who carries out (other than as an owner-builder) or supervises restricted building work under a building consent must, on completion of the restricted building work, provide the persons specified in subsection (2) with a record of work, in the prescribed form, stating what restricted building work the licensed building practitioner carried out or supervised...”

[21] The use of the word “each” makes it clear that every licensed building practitioner who carries out restricted building work has to complete a record of work for the work they did.

[22] It must also be noted that the reference to supervision in the context of records of work is to the supervision of persons who are not authorised to carry out restricted building work, i.e. non-licensed persons. A licensed building practitioner does not require supervision by virtue of their own licence – they are authorised to carry out restricted building work. Even if one practitioner was to consider that they were in overall charge of a building site and of the work being carried out under a building consent (such as where they hold a Site Licence) the wording “each licenced person...” in section 88 cannot be ignored.

[23] The wording of the section is clear. The obligation is for each and every licensed building practitioner to provide a record of work for the restricted building work they carried out or supervise irrespective of whether there may be another licensed building practitioner on site who may be providing overall coordination or oversight.

[24] Persons who provide a record of work for restricted building work that other licensed building practitioners have completed could be exposing themselves to potential disciplinary liability.

[25] This also accords with the legislative history of the record of work provisions showing that they are designed to create a documented record of who did or supervised what in the way of restricted building work under a building consent. A record of work avoids uncertainty in situations where a single lead contractor (who may or may not be licensed) has engaged with the owner and/or territorial authority by going beyond those persons to all those that are carrying out restricted building work. It

ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out.

- [26] Given the above there was a clear requirement for the Respondent to provide a record of work for his restricted building work. He has not done so and, as such, the elements of the offence have been made out.
- [27] 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.
- [28] The only possible reason is one of ignorance of the law. The Board does not consider that this is a good reason. As a licence building practitioner, the Respondent should now be aware of his obligations and the provision of records of work should be a matter of routine.

Draft Decision on 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 matter was dealt with on the papers. Included 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

- [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.

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

- [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 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.
- [33] 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 sees no reason to depart from this starting point.

Costs

- [34] 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."
- [35] 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.
- [36] 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.*
- [37] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$500 be paid by the Respondent. 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

- [38] 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:

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.

¹² [2001] NZAR 74

¹³ Refer sections 298, 299 and 301 of the Act

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.

- [39] 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.
- [40] 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.
- [41] 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.
- [42] Based on the above the Board will not order further publication.

Draft Section 318 Order

- [43] 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(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.**
- [44] 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.

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

Submissions on Draft Decision

- [45] The Board invites the Respondent to:
- (a) provide further evidence for the Board to consider; and/or
 - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [46] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 20 December 2019.
- [47] If submissions are received, then the Board will meet and consider those submissions.
- [48] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [49] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [50] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [51] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 20 December 2019

Submissions Made

- [52] The Board received a submission from Loga Pullar, Barrister and Solicitor, on behalf of the Respondent dated 17 January 2020.
- [53] Counsel raised issues with the Board's factual findings with regard to who was present at inspections and what could be inferred from those inspections. Without delving into those matters it is noted that the submissions do not state, nor has the Respondent raised, that he did not carry out or supervise any restricted building work. In deed the submissions provided included an email of 18 December 2019 which stated the Respondent was on site for "16 days between 12 September to 14 October for cladding and cavity system". Having carried out or supervised restricted building work it follows that a record of work must be provided by the Respondent.
- [54] The submissions also raised that there was no direct communication between the Respondent and the Complainant. It was submitted that had the Complainant known of the Respondent and contacted him directly then the complaint may well have not arisen. The submission further noted common industry practice which, the submission states, is to supply records of work to main contractors.

- [55] With regard to the first aspect of the submission 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. As such the submission is rejected.
- [56] In terms of the second aspect of the submission 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. It is also to be noted whilst, at times, a Respondent may not immediately know who the owner is there are ways and means of ascertaining such details¹⁹ and that there should be no impediments to a record of work being provided to a territorial authority. The second aspect of the submission is also rejected.
- [57] The submissions went on to submit that the law is silent as to the processes around the submission of records of work. That is not the case. The Board has made its findings on the requirements clear in earlier cases and there has, in the past, been an extensive education campaign to ensure that licensed building practitioners are aware of those obligations. The campaigns included compulsory learning packages that all licensed persons had to complete.
- [58] Counsel also submitted that the Board's findings in C2-01129 should be applied. That case involved a project manager who was instructed to supervise numerous sites by his employer and who refused to provide a record of work as he had not, in fact, been able to supervise the work. He resigned from his position as a result. Those facts do not apply in this case.
- [59] Finally, the submission appears to state that the Respondent should not have to provide a record of work for remedial work. As noted above all that is required is that the Respondent have carried out restricted building work, which he did. Both he and the original licensed building practitioner will be required to provide records of work for what they did. The Respondent is not required to provide a record of work for the restricted building work that had already been completed.
- [60] No submissions were made on the Board's draft penalty or costs orders.

Final Decision

- [61] For the reasons given above the Board confirms its decision and affirms its draft decision and penalty orders.

¹⁹ Ownership details of land are available on public registers.

Final Section 318 Order

[62] 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(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.

Right of Appeal

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

Signed and dated this 4th day of March 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:*
 - (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.*