

Before the Building Practitioners Board

	BPB Complaint No. C2-01546
Licensed Building Practitioner:	Freddy Alarcon (the Respondent)
Licence Number:	BP 122216
Licence(s) Held:	Roofing Area of Practice 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	Christchurch
Hearing Type:	On the Papers
Hearing Date:	19 April 2017
Decision Date:	9 May 2017
Board Members Present	Chris Preston (Presiding) Richard Merrifield Robin Dunlop Bob Monteith

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
Background to the Complaint	3
Evidence	3
Board’s Conclusion and Reasoning	4
Penalty, Costs and Publication	5
Penalty	5
Costs.....	6
Publication	7
Section 318 Order	7
Submissions on Penalty, Costs and Publication	8
Right of Appeal	8

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.

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar under 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

- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a Respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied with their architect. The disciplinary process for architects 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.

Background to the Complaint

- [5] The allegation was that the Respondent failed to provide a record of work to the owner on completion of restricted building work as a result of a payment dispute.

Evidence

- [6] 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.
- [7] The complainant set out that restricted building work, the install of a torch on membrane, was undertaken by the Respondent over the period 29 May 2015 and 27 June 2015. A record of work was requested but it was not provided. The complainant stated this was as a result of a payment dispute with the head contractor who had gone into liquidation.
- [8] The Respondent accepted that he had carried out the restricted building work. He stated he had not been paid by Fox Group who had contracted him but had been paid by the complainant for additional work that he had been engaged to carry out for the complainant.
- [9] The Respondent, by way of his legal representative, stated that the restricted building work had not been completed and that the agreement with the complainant was that the documentation would only be provided on completion and once payment had been made. He also stated that the Respondent had contacted what he called the “LBP Association” and received advice as to his obligations. The Respondent then contacted the complainant owner who, he stated, refused to accept a record of work for restricted building work that was not complete and insisted on a guarantee being provided. He considered he could not provide a record of work that would cover other practitioners’ work.

⁴ [2016] HZHC 2276 at para 164

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

- [10] The Respondent's legal representative provided a further response on 15 March 2017 (the letter was noted as being dated 2014 but was received in 2017). Included was a record of work dated 3 August 2015.
- [11] There was no evidence as to whether the record of work had been provided to the territorial authority.

Board's Conclusion and Reasoning

- [12] The Board has decided that 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.
- [13] There is a statutory requirement under s 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. The Board discussed issues with regard to records of work in its decision C2-01170⁷.
- [14] Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work.
- [15] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in s 88(1) simply state "on completion of the restricted building work ...".
- [16] 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. This has not been the case in the present matter. The record of work was only recently provided and then only as part of the complaint response. There is no evidence that the Territorial Authority has been provided with a record of work.
- [17] The complainant has alleged it was withheld as a result of a payment dispute. The Respondent has stated it was not provided as the work was not complete and on being advised of his obligations he offered a record of work but it was refused.
- [18] The Board notes that disputes can lead to situations where the obligation to provide a record of work can arise even though the intended restricted building work has not been completed. This can result from a licensed building practitioner not being able to return to complete the work as has occurred here. In such circumstances the record of work will be due within a reasonable period of it becoming apparent to the licensed building practitioner that no further restricted building work will be

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

undertaken. The record of work was not provided until 2017 almost two years after it was technically due.

- [19] On this basis the elements of the disciplinary offence have been satisfied. The Board must, however, consider whether the Respondent has established a “good reason” for failing to provide a record of work.
- [20] The Respondent has put forward that he offered a record of work once he became aware of his obligations as set out in paragraph [18] above and that he could not provide a record of work for restricted building work completed by others.
- [21] Dealing with the first matter the obligation is to provide a record of work. Acceptance of one is not necessary. Only that it is provided. The Board notes in this respect that provision can be done a number of ways including by post and as such there was no real impediment to the Respondent providing a record of work. The Board also considers the Respondent’s assertion is inconsistent with the complainant making a complaint that one had not been provided and the continued failure to provide one.
- [22] As regards the second matter the record of work that was eventually provided excluded the work of others. There was no reason why a timely record of work could not have been done on the same basis and it is noted that this was the advice the Respondent stated he was given.
- [23] The Board therefore finds that no good reasons existed.
- [24] The Board does note that the Respondent was operating under a mistaken understanding of his obligations and that he did take steps to try and deal with the record of work matter once he became aware of them. At the same time licensed building practitioners should now be aware of their obligations to provide records of work as there have been extensive education programmes around them. Notwithstanding this the Board will take the mistaken understanding into consideration as a mitigating factor.

Penalty, Costs and Publication

- [25] 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.
- [26] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication as set out in paragraph [24] above.

Penalty

- [27] 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.

- [28] 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.
- [29] Based on the above the Board's penalty decision is to order a fine of \$500. Record of work matters are at the lower end of disciplinary matters but that the same time the obligation to provide one has now been in place for some years and ignorance of the provisions and the consequences of not providing one places an unfair burden on all those involved in the building process. The Respondent should note that the Board's starting point was a fine of \$1,500 but it has reduced this on the basis of the mitigation received.

Costs

- [30] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [31] 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.
- [32] 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.*
- [33] Based on the above the Board's costs order is that the Respondent is pay the sum of \$500 toward the costs of and incidental to the Board's inquiry. In setting the amount

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

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

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

the Board has recognised that the matter was dealt with on the papers and has reduced the amount of costs accordingly.

Publication

- [34] 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 s 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.

- [35] 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.
- [36] 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 guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁶.
- [37] 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.
- [38] Based on the above the Board will not order further publication.

Section 318 Order

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

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

Costs: Pursuant to s 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.

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

¹⁶ *ibid*

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

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 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.

[40] 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

[41] 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 May 2017**. 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.

Right of Appeal

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

Signed and dated this 9th day of May 2017.



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:*

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- (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.*