

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01190

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[Omitted, Licensed Building Practitioner No. BP [omitted]]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

- 1.1 [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 7 May 2015 in respect of [omitted], Licensed Building Practitioner (the Respondent).
- 1.2 The complaint alleged the Respondent made a false declaration in providing a record of work for [omitted] (the Property).
- 1.3 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 1 November 2013.
- 1.4 The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- 1.5 The following Board Members were present at the hearing:

Chris Preston	Chair(Presiding)
Richard Merrifield	Deputy Chair
Brian Nightingale	Board Member
Mel Orange	Board Member
Robin Dunlop	Board Member
Dianne Johnson	Board Member
Catherine Taylor	Board Member
Bob Monteith	Board Member

- 1.6 The matter was considered by the Board in [omitted] on 17 November 2015 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

- 1.7 The following other persons were also present during the course of the hearing:

Terri Thompson	Counsel for the Registrar
Gemma Lawson	Board Secretary

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[Omitted]	Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Complainant
[Omitted]	Witness, Ashburton District Council
[Omitted]	Witness, Ashburton District Council

Members of the public were not present.

- 1.8 No Board Members declared any conflicts of interest in relation to the matters under consideration.

2 Board Procedure

- 2.1 The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- 2.2 In September 2015 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- 2.3 On 24 September 2015 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) failed, without good reason, to provide a record of work on completion of restricted work as required by s 88(1) of the Building Act (s 317(1)(da)(ii) of the Act).
- 2.4 On 19 October 2015 at 3 p.m. a pre-hearing teleconference was convened by Chris Preston. The Respondent and Greg La Hood as Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

3 The Hearing

- 3.1 The hearing commenced at 2 p.m.
- 3.2 At the hearing the Board was assisted in the presentation of the case by Counsel for the Registrar.
- 3.3 Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

4 Substance of the Complaint

- 4.1 The Complainant alleged a Record of Work filed by the Respondent included work the Respondent had not carried out or supervised and that as such it amounted to a false declaration.

5 Evidence

- 5.1 The Complainant was engaged to undertake building work at the Property and completed restricted building work. His involvement ended on his evidence on 14 January 2015 and on the Respondent's on 23 December 2014.
- 5.2 The Respondent took over from the Complainant as the licensed building contractor and also completed restricted building work. This included what he termed finishing off a rigid air barrier ("RAB") and, when questioned about this, he stated the RAB had to be nailed down in places where it had bowed to allow the exterior cladding to be fitted.
- 5.3 When the build was finished and a Code Compliance Certificate was being sought the Respondent was asked to provide a record of work to the Council by the owner's agent. He stated he was being pressured by the agent to submit the record of work.
- 5.4 The Respondent says he repeatedly tried to contact [omitted] and other contractors about the work they had done on the site with no success. The Complainant denied this.
- 5.5 The Respondent completed and submitted a record of work to the [omitted] District Council. He did not provide one to the owner or the owner's agent. He stated his restricted building work at the Property was finished around the end of January 2015. The record of work was not provided till 11 March 2015.
- 5.6 A record of work had also been provided by the Complainant. The two records of work did not cover all of the restricted building work.
- 5.7 Subsequent to the Respondent submitting his record of work it was modified. Annotations were made to include supervised "installed long run cladding to roof" and carried out "eco ply install". [Omitted] from the Council gave evidence that he made the annotations as regards the roof following discussions with the Respondent. The Respondent stated he made the change with respect to the eco ply also after discussions with the Council. He considered he had carried out aspects of the eco ply. The Council had asked the Respondent to include the two items.
- 5.8 The Respondent gave evidence that he contacted both the Council and a help line at the Ministry of Business Innovation and Employment (on the Council's recommendation) to enquire as to what he could provide on his record of work and whether it could cover the work of others. A transcript of his call to the Ministry was provided and the witnesses from the Council answered questions as regards their interactions with the Respondent.
- 5.9 The advice he received from the Ministry was that if he inspected the work and considered it was compliant he could "sign it off". The Council gave him similar advice. He stated he had inspected the roof cladding and the eco ply and was satisfied that both were completed to the required standards.

6 Board's Conclusion and Reasoning

- 6.1 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 building consent authority on completion of restricted building work.
- 6.2 Failing to provide a record of work is a ground for discipline under s 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only

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consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

- 6.3 The work was completed by the end of January 2015. The record of work was not provided until 11 March 2015 and then only at the insistence of the owner’s agent. As such there was a delay of some six weeks and not all of the requirements of s 88(2) were satisfied in that the owners were not provided with a record of work.
- 6.4 There is no specified time frame for a licensed building practitioner to complete and provide a record of work. Both s 88(1) and 317(1)(da)(ii) simply state “on completion”. As such it is open to the Board to interpret how soon after actual completion (bearing in mind the discussion on completion outlined above) the record of work must be provided.
- 6.5 On a literal interpretation the obligation to provide a record of work would be at the same time as completion. This would be impracticable and therefore cannot be the intended meaning. Time frames have not been specified and nor has Parliament chosen to use phrases such as “immediately on completion” or “as soon as reasonably practicable”. Given this and taking into consideration the requirement to give effect to the purpose of Parliament¹ the Board considers the use of the words “on completion” denotes a short time thereafter.
- 6.6 A degree of reasonableness has to be applied to this interpretation. Differing circumstances may result in longer or shorter timeframes. Generally, the prescribed form for a record of work is simple and straightforward and a licensed building practitioner ought to know what they have or have not done or supervised and as such there should be few impediments to it being completed and provided in short order. The situations where this is not the case will be rare and will have to be justified by the practitioner.
- 6.7 It must also be noted 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. A claim that the licensed building practitioner was not asked for a record of work will not be a defence. They must act of their own accord and not wait for others to remind them of their obligations.
- 6.8 Given the delay of six weeks, the fact the owner was not provided with a record of work and on the basis of the principles outlined above the Board does not consider the Respondent has provided a record of work on completion as required by the Act.
- 6.9 The second ground of discipline is one of negligence and or incompetence. This arises from the Respondent completing a record of work for restricted building work he did not actually carry out or supervise.
- 6.10 In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*². Judge McElrea has provided useful guidance on the interpretation of these terms:

“...the term negligence...focuses on a practitioner’s breach of their duty in a professional setting. The test as to what constitutes negligence... requires as a first step in the analysis, a determination of whether or not, in the Tribunal’s judgment, the practitioner acts or omissions fall below the standards reasonably

¹ Section 5 of the Interpretation Act 1999

² Judge McElrea, DC Whangarei, CIV-2011-088-313

expected of a... practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standards is measured against standards of a responsible body of the practitioners' peers."

- 6.11 The evidence before the Board was that the Respondent had completed a record of work for restricted building work that he had not carried out or supervised. His evidence was that he inspected the work and considered it compliant and on that basis he provided a record of work (the Board considers the work the Respondent did on the rigid air barrier was not restricted building work as the restricted aspects had been completed by the Complainant and he was only nailing down areas to allow for the installation of the cladding, not to structurally affix it). Taking this sort of an approach defeats the purpose of the record of work provisions in the Act.
- 6.12 The legislative history of the record of work provisions show that they are designed to create a documented record of who did 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 that relationship. It ensures all those involved in the restricted building work can be identified by the owner and the territorial authority along with the restricted building work they carried out.
- 6.13 The Board does not consider a reasonable licensed building practitioner would provide a record of work for another practitioner's restricted building work and that to do so, given the statutory purpose for records of work, falls below the expected standards and therefore amounts to negligence.
- 6.14 The Board notes, however, that the Respondent relied on advice from both the Ministry of Business Innovation and Employment and the Council in this respect and as the former is the regulator of building work the Respondent could claim the defence of "officially induced error".
- 6.15 Ignorance of the law is not a defence but ignorance based on erroneous advice from an official can be. In *Wilson v Auckland City Council* (No 1) [2007] NZAR 705 (HC) the appellant, was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police* (1994) 11 CRNZ 132 Holland J found that where a person committed a crime believing it to be lawful on the grounds of "officially induced error" it was in the public interest as well as being just that that person should not be held criminally liable.
- 6.16 The Board considers the Respondent was given and relied on official advice especially in respect of the advice received from the Ministry. Ordinarily the Board would find a licensed building practitioner to have been negligent where they provide a record of work for restricted building work they have not actually carried out or supervised. Given the reliance, however, the Board does not consider the Respondent has been negligent or incompetent in this instance.

7 Complaint Decision

- 7.1 The Board has decided that Respondent has carried out or supervised building work which is the subject of the complaint as a Licensed Building Practitioner failed,

without good reason, to provide a record of work, on completion of the restricted building work as required by s 88(1) of the Act (s 317(1)(da)(ii) of the Act) and should be disciplined.

8 Disciplinary Penalty

- 8.1 The grounds upon which a Licenced Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Actⁱ. Under s 318(4) of the Act, the Board has the power to order the Respondent to pay the reasonable costs and expenses of, and incidental to, the Board's inquiry and pursuant to s 318(5) of the Act, the Board may publicly notify any disciplinary action taken against a Licensed Building Practitioner in any way it thinks fit.
- 8.2 The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make written submissions on those matters.
- 8.3 The Board considers it heard sufficient evidence at the hearing to enable it to make a decision on penalty, cost and publication of name including matters pertaining to mitigation and it has taken these into consideration. It will, however, afford the Respondent the opportunity to make submissions should the Respondent consider there is further mitigation the Board should take into consideration.
- 8.4 The Board is aware that the common understanding of the purposes of professional discipline is to uphold the integrity of the profession. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

*"The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour."*³

- 8.5 The Board notes that since the inception of the Licensed Building Practitioner scheme an extensive education programme has been undertaken to inform licensed building practitioners of their obligation to provide records of work. Initially the Board took a lenient view given the general misunderstandings and lack of knowledge that existed. The time has come, however, for the leniency to cease. There has been sufficient opportunity for practitioners to familiarise themselves with the Act's provisions.
- 8.6 In all the circumstances the Board considers a fine of \$1,000 to be the appropriate penalty.

9 Costs

- 9.1 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."
- 9.2 The Respondent defended the hearing and the findings of the Board are such that a contribution to the costs of its inquiry is appropriate. 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

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

to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*⁴ included the following:

“It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”

- 9.3 The judgment in *Macdonald v Professional Conduct Committee*⁵ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*⁶ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.
- 9.4 The Board notes that the Respondent has been cooperative in regard to the Board’s inquiry. This and the Respondent’s financial position are appropriate matters to be considered in mitigation.
- 9.5 Under all the circumstances, the Board has reduced the order for costs and the sum of \$500 is considered to be a reasonable amount toward the costs of and incidental to the Board’s inquiry.

10 Publication of Name

- 10.1 As a consequence of these decisions the Respondent’s name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licenced Building Practitioners’ scheme as is required by the Act.
- 10.2 Having taken into account the circumstances of the case and the mitigation presented, the Board does not find it necessary to further publish the Respondent’s name or to specifically identify him in other publications.

11 Decision

- 11.1 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 \$1,000.

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.

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.

⁴ HC, Wellington, AP23/94, 14 September 1995

⁵ HC, Auckland, CIV 2009-404-1516, 10 July 2009

⁶ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

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12 Submissions on Penalty Costs and Publication

- 12.1 The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 12 January 2016.
- 12.2 If no submissions are received, then this decision will become final.
- 12.3 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.

13 Right of Appeal

- 13.1 The Respondent has a right to appeal the Board decisions under s 330(2) of the Actⁱⁱ.

Signed and dated this 15th day of December 2015



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.