Before the Building Practitioners Board
AT Auckland

BPB Complaint No. C2-01375

Under the Building Act 2004 (the Act)

IN THE MATTER OF An inquiry by the Building Practitioners Board under section 315 of the Act

AGAINST Malcolm Wolfgram, Licensed Building Practitioner No. BP 121779

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] The Building Practitioners Board (the Board) received a complaint from [Omitted] into the conduct of Malcolm Wolfgram, Licensed Building Practitioner (the Respondent) in relation to building work at [Omitted].

[2] On 31 March 2016 the complainant gave notice to the Board that she wanted to withdraw her compliant. On 12 May 2016 the Board considered the withdrawal and resolved to continue with the matter as a Board Inquiry.

[3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 25 October 2012.

[4] The Board has considered the inquiry under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).

[5] The following Board Members were present at the hearing:

Chris Preston	Chair(Presiding)	Layperson
Brian Nightingale	Board Member	Registered Quantity Surveyor and Registered Construction Manager
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Robin Dunlop	Board Member	Retired Professional Engineer

[6] The matter was considered by the Board in Auckland on 21 March 2017 in accordance with the Act, the Regulations and the Board's Complaints and Inquiry Procedures.

[7] The following other persons were also present during the course of the hearing:

Gemma Lawson	Board Secretary
Malcolm Wolfgram	Respondent

[8] No Board Member declared any conflict of interest in relation to the matters under consideration.

Board Procedure

[9] On 1 November 2016 the Registrar of the Board prepared a report in accordance with reg 20 and 21 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the inquiry.

[10] On 1 December 2016 the Board considered the Registrar's report and in accordance with reg 22 it resolved to proceed with the inquiry 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).

[11] The Respondent set out in his response to the original complaint that he was suffering a medical condition and that this was the reason why the record of work had not been provided. The Board directed the Registrar seek a medical certificate from the Respondent and that it would, following its receipt, consider whether the matter would be set down to be heard on the papers or in person.

[12] On 23 January 2017 the Respondent provided a medical certificate and the Board directed that the matter be set down for a hearing in Auckland so as to allow the Respondent to appear and be heard.

[13] On 27 February 2017 a pre-hearing teleconference was convened by Chris Preston. The Respondent was present, the hearing procedures were explained and his attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

[14] 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[1].

[15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[2]:

> *Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and*

[1] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[2] [1992] 1 NZLR 720 at p 724

> *the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[16] In *McLanahan and Tan v The New Zealand Registered Architects Board*[3] 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."*

[17] The same applies as regards the disciplinary provisions in the Building Act.

[18] It must also be noted that the Board has jurisdiction only with regard to "the conduct of a licensed building practitioner" and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes.

The Hearing

[19] The hearing commenced at 10 am.

[20] The Respondent was sworn in, he gave evidence and answered questions from the Board.

Substance of the Inquiry

[21] The allegation was that the Respondent failed to provide a record of work on completion of restricted building work.

Evidence

[22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority *is Z v Dental Complaints Assessment Committee*[4] where Justice McGrath in the Supreme Court of New Zealand stated:

> *[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*
>
> *[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the*

[3] [2016] HZHC 2276 at para 164

[4] [2009] 1 NZLR 1

> *reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

[23] It is to be noted that under s 322 of the Act the Board has relaxed rules of evidence:

> ***322 Board may hear evidence for disciplinary matters***
>
> *(1) In relation to a disciplinary matter, the Board may—*
>
> *(a) receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the disciplinary matter, whether or not it would be admissible in a court of law.*

[24] The original complaint which led to the inquiry outlined that restricted building work was carried out by the Respondent between 1 September 2014 and 30 September 2015. The complainant, as at the date of the complaint (23 March 2016), had not received a record of work from the Respondent despite having made several requests for one. The complainant set out that she believed the reason for the delay or refusal was a payment dispute and the Respondent's company going into liquidation.

[25] On 31 March 2016 the complainant sought to withdraw the complaint. The request set out that the complainant had, since making the complaint, received a record of work.

[26] The Respondent denied that the record of work was withheld for commercial reasons. In his response he stated the reason for the delay was his state of mind at the time. He set out that his business had failed and that he was "suffering great discomfort until (he) was able to get the correct medication to enable (him) to get through the week adequately".

[27] The Respondent produced a medical certificate dated 19 January 2017. It stated:

> *The above patient was seen and examined by me on 19/1/17 and this is to certify that Malcolm was experiencing stress and anxiety after his business folded at the end of 2015.*
>
> *He required regular review at this medical centre, especially given his other medical conditions.*
>
> *He was given medication that enabled him to function normally in his work environment.*

[28] The Respondent's business, Copeland Construction NZ Limited, was incorporated on 25 February 2014. It was placed into liquidation on 9 November 2015. The Respondent stated that the liquidation resulted from the company's failure to satisfy a statutory demand issued under the Companies Act.

[29] Companies Office records confirmed the liquidation. The liquidator's report referred to the Respondent being in the process of being adjudicated as bankrupt. Insolvency Office records show that the Respondent has since been adjudicated as bankrupt and that it is his fourth bankruptcy.

[30] At the hearing the Respondent stated he had not received requests for a record of work as his phone number and email had changed post the liquidation of his company. He also stated that the liquidation had a detrimental effect on him as he was 67 years of age and was having to return to the tools as a result of the business failure. He also noted he had a good reputation as a builder.

[31] The Respondent gave evidence as to his practices with regard to records of work and that he had issued five records of work since the complaint was made. He stated he normally provides records of work to the owner or main contractor when he is asked for one and that he leaves it to the owner to provide the record of work to the territorial authority. He noted there has, on occasion, been be a delay of up to a year in the provision of a record of work from when his work has been completed as he waits till the job as a whole has been completed and he is asked for a record of work.

Boards Conclusion and Reasoning

[32] There is a statutory requirement under s 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[5].

[33] 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 consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[34] The Board discussed issues with regard to records of work in its decision C2-01170[6] 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.

[35] Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work to both the owner and the territorial authority. Provision to one and not the other will not satisfy the requirements of s 88 of the Act.

[36] 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 …". On a literal interpretation, the obligation to provide a record of work would be at the same time as completion. This would be impracticable. Given this and taking into consideration the requirement to give effect to the purpose of Parliament[7] the Board considers the use of the words "on completion" denotes a short time thereafter.

[37] The record of work in question was not provided until after a complaint had been made which was at least six months after completion of the restricted building work. The statutory time frames have clearly not been met.

[38] Moreover the record of work was only provided to the owner. As stated above this does not fulfil the statutory obligation. The territorial authority must also be provided with one by the licensed building practitioner and whilst this can be fulfilled by the

[5] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[6] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

[7] Section 5 of the Interpretation Act 1999

owner or a main contractor on behalf of the licensed building practitioner they do run the risk of being disciplined should that person not follow through and submit it.

[39] The Board notes the Respondent's evidence as to his record of work processes and in particular his reference to waiting until he is asked for a record of work before he provides one. He should note that the obligation lies with him to provide a record of work irrespective of any request for one. It is not a defence to state that a record of work was not asked for. A licensed building practitioner must act of his or her own accord and not wait for others to remind them of their obligations.

[40] Section s 317(1)(da)(ii) of the Act does provide for a defence of the licensed 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.

[41] When bringing the record of work provisions into effect it was noted by the legislators that illness or incapacity may amount to a good reason. The Board considered that what was envisaged was an event that prevented the licensed building practitioner from providing a record of work and that a good reason of this nature will not be open ended. Once the circumstances delaying its provision have ended the record of work will be due.

[42] In the present incidence, the illness as disclosed in the medical certificate which has been put forward as a possible good reason were not such as to incapacitate the Respondent. Even if the illness had been such as to give rise to a good reason the Board considers the delay was excessive in that it went beyond the period of time when the Respondent's illness might have provided a good reason. The Board does acknowledge that it was a difficult period for the Respondent and circumstances may, however, go to mitigation as regards penalty and as such will be considered in that context.

[43] Having been found to have failed to provide a record of work on completion of restricted building work and there being no good reason for the failure the Board finds that the disciplinary offence has been committed.

Board Decision

[44] 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.

Disciplinary Penalties

[45] The grounds upon which a Licensed 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 Act[i].

[46] The Board's Complaints and Inquiry 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 submissions on those matters.

[47] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was the Respondent's illness at the time of the offending.

[48] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there a further matters which the Board should take into consideration.

[49] As stated earlier 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.

[50] 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 uphold professional standards:

> *[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.*
>
> *[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.*

[51] In *Lochhead v Ministry of Business Innovation and Employment*[9], an appeal from a decision of the Board, the court, in respect of penalty noted:

> *[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.*
>
> *[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall*

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

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

> *assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).*

[52] Generally the Board considers record of work matters to be at the lower end of the disciplinary scale. At the same time there has been considerable effort made to educate practitioners as to their obligations and, given this, the Respondent's very limited knowledge of the record of work provisions in the Act is an aggravating feature.

[53] As outlined in paragraph [42] the Board notes the health circumstances surrounding the liquidation of the Respondent's company and it considers this can be taken into account as mitigation. The demise of the business itself is not a mitigating factor.

[54] In all the circumstances the Board considers a fine of $500 is warranted. The Board had a starting point of $1,500 but it has reduced this to $500 on the basis of the mitigation heard.

Costs

[55] 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."

[56] 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 case. The judgment in *Cooray v The Preliminary Proceedings Committee* [10] 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."*

[57] The judgment in *Macdonald v Professional Conduct Committee*[11] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[12] where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[58] In *Collie v Nursing Council of New Zealand*[13] 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. It is not hard to see that the award of costs may*

[10] HC, Wellington, AP23/94, 14 September 1995
[11] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[12] High Court, Auckland, CIV-2009-404-005245, 25 February 2010
[13] [2001] NZAR 74

> *have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.*

[59] The Board's normal costs for a defended matter is $1,500 and for a record of work matter that is heard on the papers is $500. The matter before the Board was defended but was not overly complex in its nature and as such costs of $1,000 are considered to be reasonable. This is significantly less than the 50% of actual costs noted as being reasonable in the precedents above.

Publication of Name

[60] 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 Act.

[61] 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.*

[62] 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.

[63] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[14]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[15]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[16]. In *N v Professional Conduct Committee of Medical Council*[17] the High Court pointed to the following factors:

> *The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*
>
> - *issues around the identity of other persons such as family and employers;*
> - *identity of persons involved and their privacy and the impact of publication on them; and*
> - *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[64] 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 interest[18]. 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.

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[14] Section 14

[15] Refer ss 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

[65] The Board does not consider that any further publication is required.

Penalty, Costs and Publication Decision

[66] 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 $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 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 him being named in this decision.

Submissions on Penalty Costs and Publication

[67] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **1st May 2017.**

[68] If no submissions are received then this decision will become final.

[69] 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.

Non Payment of Fines or Costs

[70] The Respondent should take note that the Board may, under s 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. Section 319 provides:

> ***319 Non-payment of fines or costs***
>
> *If money payable by a person under section 318(1)(f) or (4) remains unpaid for 60 days or more after the date of the order, the Board may—*
>
> *(a) cancel the person's [licensing] and direct the Registrar to remove the person's name from the register; or*
>
> *(b) suspend the person's [licensing] until the person pays the money and, if he or she does not do so within 12 months, cancel his or her [licensing] and direct the Registrar to remove his or her name from the register.*

Right of Appeal

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

Sgned and dated this 6th day of April 2017.

Chris Preston
Presiding Member

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[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.