

## Before the Building Practitioners Board

	BPB Complaint No. CB 25867
Licensed Building Practitioner:	Nicholas McGuffie (the Respondent)
Licence Number:	BP 132218
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing Date:	4 August 2022
Decision Date:	29 August 2022

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister  
Mr C Preston, Chair (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2

#### 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.

#### Disciplinary Finding:

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

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### Summary of the Board’s Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$2,000. The disciplinary outcome will be recorded on the Register of Licensed Building Practitioners for a period of three years.

### The Board

- [2] The Board is a statutory body established under the Building Act.<sup>1</sup> Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

### The Hearing

- [3] The Board, on receiving a Registrar’s Report in respect of the matter, reviewed the file and decided to deal with it by way of a Draft Decision.
- [4] The Respondent disputed the findings in the Draft Decision. The Draft Decision was set aside, and a hearing was scheduled.

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<sup>1</sup> Section 341 of the Act.

## The Charges

- [5] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>2</sup> to hold a hearing in relation to building work at [OMITTED]. The alleged disciplinary offences the Board resolved to investigate were 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

- [6] 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*<sup>3</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>4</sup>.
- [7] 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*,<sup>5</sup> 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.”*

- [8] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons<sup>6</sup>:

*... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

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<sup>2</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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

<sup>4</sup> [1992] 1 NZLR 720 at p 724

<sup>5</sup> [2016] HZHC 2276 at para 164

<sup>6</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [9] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.
- [10] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [11] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [12] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Evidence**

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</sup>. 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.
- [14] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [15] In addition to the documentary evidence before the Board heard evidence at the hearing from the Complainant and the Respondent. Mr Jason Carr, a Building Control Officer from the Tauranga City Council, was also present and gave evidence.
- [16] The complaint related to the failure to provide a record of work on completion of restricted building work. It was accepted that the Respondent had engaged in restricted building work on a new residential dwelling at [OMITTED] under a building consent. The extent of the Respondent’s building work was in dispute. The Respondent did, however, accept that he had carried out some work on foundations,

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<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

but not all of the foundations work, and that he had carried out work through until the build was 60% clad. At that point, a dispute resulted in him ceasing his involvement in the build. It was accepted that the Respondent's building work started on or about 30 October 2020 and came to an end on or about 27 July 2021.

[17] The Complainant stated he had made multiple requests for a record of work by email but had not received one. At the hearing, the Complainant also noted that the Council had also asked the Respondent for a record of work. A copy of the Council Property file was obtained on 30 November 2021, and it did not contain a record of work from the Respondent. The Complainant accepted that he did receive a record of work at some later point in time.

[18] As noted, the Board initially dealt with the matter by way of a Draft Decision. The Respondent provided a written response to the Draft Decision. In it, he stated:

*I advise [OMITTED] by email around August he would receive memorandum of works later in the year. This was sent to [OMITTED] 25/11/21. See copy.*

[19] The response went on to note that the Respondent took over from another builder when preparation work for the foundations had been completed. He stated he was the Licensed Building Practitioner from that point but only for the foundation work that he carried out and that this did not include work carried out by others when he was on site. He alleged the owner engaged in carrying out restricted building work and that the owner was working as an "owner-builder" and that the Complainant would have to seek an owner-builder exemption.<sup>8</sup> He stated:

*All of this has made the process of submit my record of work difficult and very unclear on what all party had engaged in.*

[20] The Respondent's record of work that he provided had the correct Form 6A Record of Building Work front page but then continued on with pages from a Certificate of Design Work. The document, dated 5 November 2021, was the same as that which had been sent to the Council by the Complainant after he had received it from the Respondent.

[21] The Respondent was questioned as to why he had not provided all of the correct form. He was not able to provide an answer or reason and appeared confused as to the issue and error. The form he provided noted various items of restricted building work.

[22] At the hearing, the Respondent stated that he had never refused to provide a record of work and reiterated that he needed clarity as to what others had completed before he could provide one. The Respondent also noted various frustrations he had with the Complainant and the Complainant's project management during the build.

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<sup>8</sup> The Board does not have any jurisdiction over unlicensed persons who carry out restricted building work.

The Respondent referred to an outstanding payment but stated that the debt was not a reason for him not providing a record of work.

- [23] The Council witness was asked to confirm that the building work was not being carried out under an owner-builder exemption. He confirmed that it was not.
- [24] The Complainant was asked to provide details of when the record of work was received by him. After the hearing, he forwarded an email from the Respondent to him dated 25 November 2021, which attached the record of work.

### **Board's Conclusion and Reasoning**

- [25] 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.
- [26] 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 work<sup>9</sup>.
- [27] 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.
- [28] The Board discussed issues with regard to records of work in its decision C2-01170<sup>10</sup> 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.
- [29] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [30] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work ...". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*<sup>11</sup> "... the only relevant

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<sup>9</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>10</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

<sup>11</sup> [2018] NZHC 1662 at para 50

precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

- [31] In this matter, completion occurred on 27 July 2021 when his involvement in the building work came to an end. From that point in time on, he would not be carrying out any further restricted building work. As such, for the purposes of section 88(1) of the Act, completion had occurred. A record of work, or at least what the Respondent considered to be a record of work, was not provided until 25 November 2021.
- [32] On the basis of the above, the Respondent did not provide a record of work on completion.
- [33] 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.
- [34] The Respondent referred to difficulty ascertaining what he was to provide a record of work for given the involvement of another builder and the Complainant doing work.
- [35] Firstly, the Respondent should note that providing a record of work is not “signing off” on work. It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. In this respect, the Respondent should have known what it was that he did and did not do. Further, he could have tagged out any restricted building work that he did not do. As such, issues around what others may have done is not a good reason.
- [36] There was a payment dispute. The Respondent stated this was not a reason. He should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [37] Finally, the Respondent should also 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. He is required to act of his own accord and not wait for others to remind him of his obligations.

### **Penalty, Costs and Publication**

- [38] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty,

whether the Respondent should be ordered to pay any costs and whether the decision should be published.

- [39] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

#### Penalty

- [40] 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*<sup>12</sup> 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.*

- [41] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>13</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [42] 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, an amount which it considers will deter others from such behaviour. This was the fine the Board indicated it would impose in its Draft Decision. It sees no reason to depart from it in this decision as there are no aggravating nor mitigating factors present. The fine is set at \$1,500.

#### Costs

- [43] 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.”
- [44] 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

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<sup>12</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>13</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288



that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>14</sup>.

- [45] In *Collie v Nursing Council of New Zealand*,<sup>15</sup> 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.*

- [46] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>16</sup> the High Court noted:

*[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*

*[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

- [47] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was simple. Adjustments based on the High Court decisions above are then made.

- [48] A hearing was held. The Board's scale costs for a hearing of this type is \$3,500. The matter was simple, and the Board had decided, in the interests of natural justice, that a hearing was required rather than confirming its Draft Decision. On that basis the costs order has been reduced to \$2,000.

#### Publication

- [49] 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<sup>17</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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<sup>14</sup> *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.

<sup>15</sup> [2001] NZAR 74

<sup>16</sup> CIV-2011-485-000227 8 August 2011

<sup>17</sup> 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.*

- [50] 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.
- [51] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>18</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>19</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>20</sup>. 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*<sup>21</sup>.
- [52] 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<sup>22</sup>. 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.
- [53] Based on the above, the Board will not order further publication.

### **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)9f) 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 \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(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.**

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<sup>18</sup> Section 14 of the Act

<sup>19</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>20</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>21</sup> *ibid*

<sup>22</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [55] 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**

- [56] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **30 September 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. 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.
- [57] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

### **Right of Appeal**

- [58] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>i</sup>.

Signed and dated this 9<sup>th</sup> day of September 2022



**Mr M Orange**  
Presiding Member

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<sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
  - (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
  - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
  - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
  - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

**ii Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
  - (b) *to take any action referred to in section 318.*

**Section 331 Time in which appeal must be brought**

*An appeal must be lodged—*

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*