

## Before the Building Practitioners Board

	BPB Complaint No. CB25608
Licensed Building Practitioner:	Campbell Morris (the Respondent)
Licence Number:	BP 131256
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	Wellington
Hearing Type:	In Person
Hearing Date:	27 July 2021
Decision Date:	1 September 2021

#### Board Members Present:

Mr C Preston, Chair (Presiding)  
Mr M Orange, Deputy Chair, Barrister  
Mrs F Pearson-Green, LBP, Design AOP 2  
Ms J Clark, Barrister and Solicitor, Legal Member

#### 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.

The Respondent **has not** committed a disciplinary offence under section 317(1)(b) or (d) of the Act.

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**Summary of the Board’s Decision**

[1] The Respondent has failed to provide a record of work on completion of restricted building work. he is fined \$1,500 and ordered to pay costs of \$750. The Board has also decided that the Respondent has not carried out building work in a negligent or incompetent manner on the basis that the contraventions were not serious enough and that he did not carry out building work in a manner that was contrary to a building consent.

## The Charges

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</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:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, the Respondent may have carried out building work identified by the Complainant at page 21 of the Board's file (document 2.1.7 together with supporting photographs at pages 34 to 43 of the Board's files), in a manner that was not consistent with quality and/or compliance requirements; and
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT, the building work identified above at [3](a) may not have been carried out in a manner that was consistent with the building consent issued; and
  - (c) 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

## Function of Disciplinary Action

- [3] 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>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [4] 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>4</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*

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<sup>1</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

*maintained in order to protect clients, the profession and the broader community.”*

- [5] 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>5</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.*

- [6] 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.
- [7] The above commentary on the limitations of the disciplinary process are 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**

- [8] 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.
- [9] 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**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

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<sup>5</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [11] 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.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from the Complainant and from [Omitted], a Licensed Building Practitioner who had some involvement in the building work after the Respondent's involvement.
- [13] The matters complained about, as stated in the complaint, that the Board decided to further investigate were:
- (a) severe bend in roof ridge;
  - (b) out of plumb new walls and tapering off floor joist;
  - (c) out of square walls including bends;
  - (d) broken roof trusses;
  - (e) out of level, plumb and twisted joinery;
  - (f) lintels not tied in;
  - (g) damaged new joinery during attempted remedial;
  - (h) cladding out of level; and
  - (i) withholding record of work.
- [14] The issues noted were identified by [Omitted], who supervised the Complainant after the Respondent had finished on site. [Omitted] did not carry out any building work.
- [15] The Respondent was engaged to carry out building work on extensive alterations to an existing dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started on or about 18 June 2019. The Respondent's last invoice for services was 9 September 2019, which was on or about the date when the Complainant and his family moved back into the dwelling. An inspection was carried out on 17 October 2019, but neither the Complainant nor the Respondent could recall if he was at that inspection. It was called for by the Complainant. There were some further on-site attendances to carry out remedial work and the Respondent's involvement came to an end on or about 24 January 2020. A new builder was noted as being involved in the project on 5 March 2020.
- [16] The Respondent noted that the scope of the build grew as the build progressed and that, as the building was opened up, it became apparent that the existing lintels, framing, and frame to floor connections were, in many instances, inadequate and in need of replacement or remediation to make it compliant. The Respondent stated had two unlicensed carpenters on-site and, in the later stages, a labourer. He considered that he had done a good job given what they were presented with on-site and that the work was not complete.

- [17] The building work that was undertaken included moving the building off its piles, installing new piles and the reconnection of the building to the new piles. In total, the building was moved three times to allow the re-piling. The Respondent did not carry out the piling or the building move but did install the bearers. The pile heights were set by others.
- [18] The building work that the Respondent did carry out included preparing the site and carrying out wall and roof framing, building wrap, long-run roofing, weatherboard cladding, soffits, and exterior joinery and flashings. The Respondent did not install any insulation, plasterboard, internal bracing, or battens. The Board did not further investigate those aspects of the build. When the Respondent left the site, one window was temporarily installed, and some of the flashings were not complete.
- [19] The Respondent gave evidence that he was given three to four weeks' notice that the Complainant and his family would be moving back into the dwelling. He stated that the focus thereafter was making the premises weathertight.
- [20] The documentary evidence supplied to the Board included photographs of the building work. The photographs showed a vaulted skillion ceiling that was being installed to part of bedroom two, where the building consent documentation showed a flat ceiling at stud height. The Respondent stated that it was a design change directed by the Complainant who was dealing with the designer and engineer and that he had advised the Complainant that an amendment to the building consent would be required for it as it would have changed the bracing in that area of the dwelling. The Respondent stated that the only building work he did in relation to it was the installation of a lintel which, he hoped, would be consistent with the solution developed for the change. He stated that he did so to provide structural strength when the building was moved but later stated that he did not carry out any internal building work prior to the building being put back onto the piles.

#### Severe bend in roof ridge

- [21] The Complainant considered a bend in the centre of the ridgeline may have come about when load-bearing side walls were removed, and the new walls stepped out onto an extra bottom plate and that this caused the ridge to slump.
- [22] The Respondent agreed that the walls had been moved out but that the spine of the house, which was old, had snapped prior to the building work being undertaken and that the new framing had to be stepped out as so as to align it with existing framing. He noted that, as the build progressed, and the scope of framing replacement grew, the existing framing that the new framing had been aligned with was removed but that it was not possible to move the new framing back in as the trusses had been installed.

Out of plumb new walls, tapering off floor joist, out of square walls

- [23] The Complainant stated that a wall in the centre of the dwelling denoted as clouded area 2 on Sheet No. 1.07 was out by 28mm over a 3-metre stud.
- [24] The Respondent noted that it was an old building and that it was out of plumb and that it is unreasonable to expect renovation work on an old dwelling to be perfect. The work was carried out by one of his staff members. He did not check it. The issue also related to the bend in the roof-ridge.

Broken roof trusses

- [25] The issue related to a knot in the timber and was a manufacturing issue. The Respondent attended to remediation. The repair was signed off by the engineer.

Out of level, plumb and twisted joinery and damaged joinery

- [26] Two windows were complained about – window 3 at the front of the dwelling and 14 which was a bathroom window. The Complainant stated that when window 3 was remediated, the joinery was damaged.
- [27] The Respondent stated he was not aware of the issue with the bathroom window. He was aware of the front window issue. He stated the window was temporarily installed as the head flashing had not been supplied by the Complainant. It had been temporarily weatherproofed. He noted that when he returned in early 2020 to reinstall the window, the fixings had been punched and painted. The damage occurred as a result of the temporary fixings being punched home, which caused difficulty in removing the window. The Respondent maintained that he had informed the Complainant that the window was not complete and that it was obvious that it was not finished.
- [28] The Complainant also raised an issue with missing flashing tape. He stated it was an assumption that it was not installed. The Respondent stated it had been installed.

Lintels not tied in

- [29] An area of work shown in a photograph on page 209 of the file was discussed. Two bracing walls were bracing shown, framing was a mix of existing and new along with a new lintel. The Respondent was asked how the framing and bracing would be completed. He stated that more work had to be done and that it was left so that the exterior could be closed in.

Cladding out of level

- [30] The Complainant noted that the cladding on different elevations of the dwelling did not line up and that it was not aesthetically pleasing when viewed against windowsill heights.
- [31] The Respondent stated that the Complainant supplied two packs of weatherboards which did not match in that there was a 2-3mm difference per weatherboard in their

respective gauges and that those differences add up over a wall. The Respondent also noted that the floor was out of level by approximately 8mm.

#### Withholding record of work

- [32] A record of work dated 9 June 2020 was provided to the Board on 2 October 2020 as part of its investigations. The Respondent stated that he sent the record of work in late September or early October by post. The Territorial Authority advised that, as of 8 March 2021, a record of work was not on its files. The Respondent stated that he believed the record of work would be provided to the Territorial Authority by the Complainant when a code compliance certificate was applied for.
- [33] Correspondence on the file noted that a request for a record of work was made by the Complainant on 10 January 2020 by email and again on 14 May 2020. There was also evidence of a commercial dispute in the correspondence.
- [34] The Respondent gave evidence that he had some six weeks off at about the time of his involvement in the build coming to an end when he was recovering from leg surgery and that, thereafter, he was very busy.

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

- [35] The Board has decided that the Respondent **has not**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); or
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- [36] 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.
- [37] The reasons for the Board's decisions follows.

#### Negligence and/or Incompetence

- [38] The Board's finding that the Respondent has not carried out or supervised building work in a negligent or incompetent manner has been made on the basis that the conduct was not sufficiently serious enough to warrant disciplinary action.
- [39] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired

into. This is described as the *Bolam*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

- [40] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*,<sup>9</sup> it was stated as “*an inability to do the job*”.
- [41] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>10</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [42] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>11</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>12</sup>.
- [43] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>13</sup>, the Court’s noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

- [44] Again, in *Pillai v Messiter (No 2)*<sup>14</sup> the Court of Appeal stated:

*... 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>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>12</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>13</sup> [2001] NZAR 74

<sup>14</sup> (1989) 16 NSWLR 197 (CA) at 200

- [45] On the basis of the above decisions, the Board has decided that whilst there was some evidence of building work that may not have been completed to an acceptable standard, the matters raised did not reach the seriousness threshold as outlined in the above court decisions. In particular, the Board noted that the work was not complete, some aspects were within acceptable tolerances or were aesthetic in nature, and that the focus of the work had moved to the completion of exterior work to enable the Complainant to move back into the dwelling.

#### Contrary to a Building Consent

- [46] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 provides:

**40 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [47] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act.
- [48] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.
- [49] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent. Unlike negligence contrary to a building consent is a form of strict liability offence. All that needs to be proven

is that the building consent has not been complied with. No fault or negligence has to be established<sup>15</sup>.

- [50] The change to a skillion ceiling structure was a change that would have required a change to the building consent. The Respondent had advised the Complainant that a change was required. He had carried out very limited preparatory work. It was unclear what the purpose of that work was at the time it was carried out.
- [51] Given the limited nature of the work carried out by the Respondent, the advice that he issued, and the fact that the Complainant was dealing with the engineer and the designer, the Board has found that the offence has not been committed. The Respondent is, however, cautioned that he needs to take care in future to ensure that the building consent change process has been completed prior to the work being undertaken.

#### Record of Work

- [52] 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>16</sup>.
- [53] 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.
- [54] The Board discussed issues with regard to records of work in its decision C2-01170<sup>17</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.
- [55] 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.
- [56] 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>18</sup> “... the only relevant

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<sup>15</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>16</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>17</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

<sup>18</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”.

- [57] As to when completion will have occurred is a question of fact in each case.
- [58] 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. Completion occurred in late January 2020. A record of work was not provided until late September or early October 2020 to the owner but only after multiple requests were made. It was not provided to the Territorial Authority. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [59] 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.
- [60] The Respondent noted he was recovering from surgery soon after completion. The time when he was recovering may have been a good reason. The delay, however, went well beyond that period. The Respondent also stated he was busy. That is not a good reason.
- [61] In this instance, there was an ongoing payment dispute. Whilst it was not stated as a reason 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.
- [62] 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. He should further note that it is his obligation to provide it to the Territorial Authority. He should not rely on an owner providing it.

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

- [63] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [64] 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

[65] 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>19</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.*

[66] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>20</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.

[67] 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. There are no aggravating nor mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

### Costs

[68] 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.”

[69] 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<sup>21</sup>.

[70] In *Collie v Nursing Council of New Zealand*,<sup>22</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

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<sup>19</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>20</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>21</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>22</sup> [2001] NZAR 74

*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.*

- [71] The Board's scale of costs for a half-day in-person hearing is \$3,500. The Board notes, however, that the only charge upheld was the record of work allegation. Had the Board only dealt with the record of work matter, it would have decided it on the papers, and the costs would have been \$500. Countering this, the Respondent provided a very limited response to the complaint. It did not deal with the specifics of the allegations. A hearing was therefore required. Taking all those factors into account, the Board has decided that costs of \$750 will be ordered.

### Publication

- [72] 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>23</sup>. The Board is also able, under section 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.*

- [73] 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.
- [74] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>24</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>25</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>26</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>27</sup>.
- [75] 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>28</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.

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<sup>23</sup> Refer sections 298, 299 and 301 of the Act

<sup>24</sup> Section 14 of the Act

<sup>25</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>26</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>27</sup> *ibid*

<sup>28</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[76] Based on the above, the Board will not order further publication.

### **Section 318 Order**

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

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

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (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(l)(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.**

[78] 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**

[79] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **22 September 2021**. 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.

[80] 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

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

Signed and dated this 1<sup>st</sup> day of September 2021



**Mr C Preston**  
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:*
  - (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."*

### <sup>ii</sup> **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*

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(b) *within any further time that the appeal authority allows on application made before or after the period expires.*