

## Before the Building Practitioners Board

	BPB Complaint No. CB25881
Licensed Building Practitioner:	Rakatau Rawiri (the Respondent)
Licence Number:	BP137030
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	Christchurch
Hearing Type:	In Person
Hearing and Decision Date:	7 June 2022
Board Members Present:	
	Mr C Preston, Chair (Presiding)
	Mr M Orange, Deputy Chair, Barrister
	Mr R Shao, LBP, Carpentry and Site AOP 1
	Mr G Anderson, LBP, Carpentry and Site 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 disciplinary offences under section 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

## Contents

<b>Summary of the Board’s Decision</b> .....	2
<b>The Charges</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Inquiry Process</b> .....	4
<b>Evidence</b> .....	4
Cladding .....	8
Windows .....	8
Entrance Posts .....	8
Record of Work.....	9
<b>Board’s Conclusion and Reasoning</b> .....	9
Negligence and/or Incompetence .....	9
Contrary to a Building Consent.....	12
Record of Work.....	13
<b>Penalty, Costs and Publication</b> .....	14
Penalty .....	14
Costs.....	15
Publication .....	16
<b>Section 318 Order</b> .....	17
<b>Right of Appeal</b> .....	17

## Summary of the Board’s Decision

[1] The Respondent carried out building work in a negligent manner and in a manner that was contrary to the building consent issued. He also failed to provide a record of work on completion of restricted building work. He is fined \$2,500 and ordered to pay costs of \$2,500. A record of the disciplinary offences will be maintained on the Public Register for a period of three years.

## 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], Christchurch. 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;

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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.

- (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; 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.
- [3] In further investigating the allegations under sections 317(1)(b) and (d) of the Act, the Board would be further investigating the matters set out in:
- (a) a Site notice issued by [OMITTED], Architect (page 28 of the Board's file, documents 2.1.14 to 2.1.20);
  - (b) a Site Observation Form issued by [OMITTED] of [OMITTED] (page 25 of the Board's file, documents 2.1.21 to 2.1.23); and
  - (c) Site Notices issued by the Christchurch City Council dated 4 October 2021 (page 50 of the Board's file, document 2.1.36 to 2.1.44) and 10 November 2021 (page 74 of the Board's file, documents 2.5.6 to 2.5.27),

#### **Function of Disciplinary Action**

- [4] 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>.
- [5] 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 maintained in order to protect clients, the profession and the broader community."*
- [6] 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

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<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

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.*

- [7] 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.
- [8] 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**

- [9] 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.
- [10] 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**

- [11] 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.
- [12] 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.

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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

[13] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Rakatau Rawiri	Respondent
[OMITTED]	Complainant
[OMITTED]	Complainant
[OMITTED]	Witness, Architect
Glen Mackle	Witness, Christchurch City Council

[14] The Respondent was engaged to carry out building work on an alteration and addition to a residential 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 1 June 2021 and came to an end on or about 22 October 2021. The Complainants lodged a complaint with the Board on 1 November 2021. The complaint came about after a Site Notice from Mr [OMITTED], the Architect that developed the building consent documentation, the completion of a Site Observation report from James Hardie, the cladding manufacturer, and a Site Notice from the Christchurch City Council.

[15] Mr [OMITTED]'s Site Notice, dated 27 September 2021, noted the following compliance issues:

*TIMBER WEATHERBOARD - Installation of reused windows on the south elevation. Sill flashings not installed - flexible flashing tape not acceptable. Windows frames have not been installed at the correct depth resulting in weatherboards being cut around sills leaving large gaps. Does not meet E2/AS1.*

*AXON PANEL - Installation of all windows and doors have not been installed at the correct depth to allow a 5mm min gap between the frame and cladding for sealant joint*

*The Axon Panels have generally not been fixed with the correct HardieFlex nails - jolt head nails not acceptable. Quality and workmanship of installation is generally very poor, saw-cuts not clean and straight, damaged panels at shiplap joints, external corner flashings not extending full length, all resulting in the cladding not meeting E2/AS1.*

*RECOMMENDATION -James Hardie representative to attend site and consult with Builder and Owners to provide an acceptable solution in the correct installation of the Axon Panel cladding to meet the requirements of E2/AS1 and conditions of the James Hardie product warranty.*

*ENTRANCE POSTS AND CONCRETE FOUNDATION – Construction of new concrete foundation, landing and steps not completed. Posts to foundation fixings not as per consented details. Posts to beam bolt fixings not completed.*

*Timber beam 2/140x45 not as detailed (140x90 dressed). Recommend lining beams with 6mm fibre cement sheet*

- [16] A [OMITTED] representative did attend the site. A Site Observation form dated 27 September 2021 was provided:

*Jolt head and D-head not appropriate fixing for Axon on Timber battens.  
Nailing pattern not as per Axon technical manual.*

*Appears No double stud at panel joints, visible at inspecting the panel joints at image 0602*

*At panel joints jolt nails are installed on angle and or shot through the panel as no double batten present.*

*Absence of foam Inseal at panel shiplap joints, therefore allowing water egress.*

*No allowance made for the sealant at window jamb detail. page 20 figure 11.*

*Internal corner detail no gap for the sealant joint. page 18 Figure 7.*

*The exterior extrusions are not run full length of the panels. Sheet edges appear unprimed in some cases.*

*Minimum clearances not achieved around the back of the home and the left side, Entry area has clearance but is below concrete surface level at time of inspection.*

*Axon sheet fixed at right side of front door the external corner extrusion has been broken when it has been nailed.*

*As per clause 4.5 Intermediate support. Battens installed on stud centres as well as @ 300 centres to eliminate bulging into cavity.*

*Cavity must remain free and clear providing air space between the frame and panel. Horizontal battens are non compliant.*

- [17] The Council Site Notice of 4 October 2021, issued by Mr Mackle, noted:

*Attended building site to view and discuss concerns with owner over standards of work relating to installation methods used for JH Axons Panel.*

*Observations - (see photos in conjunction with notes)*

*Panels do not have 5mm margins behind windows/doors to enable seals as specified in JH Axon Panel installation manual*

*Transition flashing made with horizontal joint. Alumin. proprietary flashings screwed on creating high points behind panels*

*Sheet vert. joints poorly constructed. 60mm galv. Jolt head nails used instead of 60mm proprietary JH flathead nails as specified by JH. Noticed 2 to 3 other*

*types of nails used as well. One identified as 25mm Mitek Product bracket nails, not designed for any other purpose other than metal structural products. Unsure of other types of nails. Sheet joints appear to not be sealed as specified in JH installation manual*

*Sheets hang further than required below bottom plate, causing minimum ground clearance issues as specified in JH installation manual and as required in NZBC E2/AS1 Section 9.0 and Table 18. Though existing concreted levels are existing, care needs to be made to be made to achieve minimum cladding to ground/hardstanding areas as much as possible. This was discussed with contractor at previous inspection before cladding started.*

*Some matters needed addressing before installing claddings at last inspection. Extra strapping required between vertical cavity battens where wall areas insulated. Also ends of horizontal battens to be cut back minimum of 50mm to allow for adequate ventilation. Also to be on more of an angle. This was discussed with and acknowledged by contractor prior to cladding installation. It is possible this has not been conducted.*

*Owner specified powder coated vertical and horizontal JH proprietary flashings. This has not been done.*

*New windows on south elevation not installed similar as existing, no sill flashing installed. Due the fact that the windows are high and protected by reasonable overhang of eaves, I am not too concerned about the lack of sill flashings. However, head flashings and general finishings to windows need to be conducted appropriately to achieve good long term weathertightness*

*Owner explained that full removal of existing concrete patio at front entry as part of planned works/contract. Particular bottom post connections were to be completed with this. None of this has been done, and contractor does not seem to think it is part of the contract.*

#### *General*

*Observations of works are of unsatisfactory standard. Contractor is not conducting works within parameters of consent plans/specifications. Also not to manufacturer's specifications or main provisions of NZBC. These matters were discussed with contractor on site during course of the inspection process, particularly the importance of thoroughly reading and adhering exactly to the manufacturer's specifications relating to installing related products. It is clear this was not done.*

*Recommend owner engage a new contractor to rectify and complete consented works. Owner also best to notify Building Practitioners Licensing Authority of concerns to enable LBP to undergo further training.*

### Cladding

- [18] The [OMITTED] list of issues was put to the Respondent. He accepted all items except for the minimum clearances issue, which he stated would have been rectified with changes to paths and landscaping, noting that concrete paths could have been removed to increase clearance.
- [19] The Respondent stated that he was on-site 90% of the time and that he had an apprentice on-site with him. He was present when the work was carried out except for brief periods when he was at another small renovation job that he was undertaking.
- [20] The Respondent confirmed he had the building consent on-site and gave evidence that he had reviewed the manufacturer's specification for how the Axion panel was to be installed. He had minimal experience with the type of cladding. Notwithstanding his review of the specifications, he was not able to provide an explanation as to why he had failed to install the panels in accordance with those specifications. He did, however, note that there was some time pressure to get the dwelling closed in as interior work being completed by others had been progressed to the point where a weathertight environment was required.

### Windows

- [21] The Respondent accepted that the windows installed in the Axion panels were not installed correctly. He stated that the two existing windows that were reused and installed in a weatherboard clad wall were tacked in place as a temporary measure. Mr Hawtin noted that details were not provided for the reinstallation of existing windows. When the Respondent was asked why he had used tape instead of a metal flashing at the sill, the Respondent stated that it was temporary and that he would have popped a weatherboard to install a flashing.

### Entrance Posts

- [22] The entry posts referred to are depicted below.



- [23] The consented plans required the construction of a footing for the posts and the use of Bomac brackets. The Respondent stated that when a wooden deck was removed the concrete pad visible in the photograph was exposed and that the connection was

temporary pending engineering details being provided for an alternate to the foundation that was consented. The Complainants noted that the Respondent should have been aware of the pad as it was noted in the contract documents. The Respondent stated that he had not allowed for the demolition of the concrete. His evidence was that he had discussed the issue with the engineer when a solution was sought (and provided) for a strip foundation that was cut into existing concrete. He stated a solution for the posts was to be provided but had not been. He had not followed up with the engineer to obtain instructions. It was noted that if the concrete had been removed, the foundation and installation of the posts could have proceeded as per the consented plans.

- [24] The Respondent was asked why the posts had been installed prior to the supporting foundation being constructed. He stated he was under time pressure as the membrane roofer needed to complete the roofing work over the entrance area.

#### Record of Work

- [25] The Respondent stated he had left a record of work at the site when he left it. There was no supporting evidence of the provision. He did not provide one to the Territorial Authority. One was not on the building consent file that the board obtained.

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

- [26] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);
- (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); 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) (s 317(1)(da)(ii) of the Act)

and **should** be disciplined.

#### Negligence and/or Incompetence

- [27] 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>.

- [28] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>9</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.
- [29] 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>10</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>11</sup>.
- [30] The Board notes that the purposes of the Act are:

### **3 Purposes**

*This Act has the following purposes:*

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
  - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
  - (iii) *people who use a building can escape from the building if it is on fire; and*
  - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

- [31] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>12</sup> and be carried out in accordance with a building

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

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>11</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>12</sup> Section 17 of the Building Act 2004

consent<sup>13</sup>. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

- [32] Turning to seriousness in *Collie v Nursing Council of New Zealand*,<sup>14</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.*

- [33] The Respondent accepted that the cladding was not installed as per the manufacturer's specifications. He stated he had the consented documents, which included the specifications on-site and had reviewed them. Notwithstanding, the cladding was installed in such a way that it was not compliant. He could not explain why the cladding had been installed in the way that it had. There was a risk that the manner of the installation could result in moisture ingress, which would be a failure of Clause E2 of the Building Code (external moisture) and which could result in a failure of Clause B2 (durability). Of itself, the failings in relation to the cladding were such that a finding that the Respondent had failed to carry out building work to an acceptable standard was warranted.
- [34] Other issues were also raised. The manner in which windows were installed was, in some instances, non-compliant. The Board accepted that existing windows that were reinstalled may have been only temporarily installed. The windows in the Axion panels were, however, not installed correctly. Again, the manner of the installation created risks of moisture ingress, and the work was not completed to an acceptable standard.
- [35] The entrance posts had been installed out of sequence. The consented detail was not followed. This is a matter that falls, more appropriately, within the disciplinary provisions of section 317(1)(d) of the Act.
- [36] Turning to seriousness, the conduct was more than error, oversight or carelessness. The failings were extensive and serious.
- [37] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

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<sup>13</sup> Section 40(1) of the Building Act 2004

<sup>14</sup> [2001] NZAR 74

### Contrary to a Building Consent

[38] 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.*

[39] 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.

[40] 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.

[41] 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>.

[42] There was clear evidence that the cladding, some windows and the entry posts had not been completed in accordance with the building consent that had been issued. With respect to the entry posts, the work had progressed in a different manner to that which was stipulated and without any engineering instructions or details. Given those factors, the offence has been committed.

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

- [43] The Board does, however, note that there is an element of duplication in this finding and that of negligence. One tends to naturally follow the other. The Board has taken this into account when considering penalty and has treated the offending under sections 317(1)(b) and (d) of the Act as a single offence.

#### Record of Work

- [44] 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>.
- [45] 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.
- [46] 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.
- [47] 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.
- [48] 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 precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [49] As to when completion will have occurred is a question of fact in each case.
- [50] 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 on or about 22 October 2022. The Respondent stated he had left a record of work on site. The Complainants did not locate it. One was not provided to the Territorial Authority (the council).
- [51] As noted above, a record of work has to be provided to both the owner and the territorial authority. Not one or the other. As one was not provided to the Territorial

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<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

Authority, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.

- [52] 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.
- [53] In this instance, there was an ongoing dispute. Whilst this was not stated as a reason, the Respondent 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.

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

- [54] 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.
- [55] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### Penalty

- [56] 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.*

- [57] 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

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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

starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [58] The offending was at the mid-range of seriousness. The Board adopted a starting point of a fine of \$3,000. The starting point includes the failure to provide a record of work matter for which the Board's normal starting point is a fine of \$1,500. The amount of the fine was consistent with fines imposed for similar offending. There were mitigating factors which related to both the work and the Respondent's personal circumstances. The Board has taken those into consideration and has reduced the fine to \$2,500.

### Costs

- [59] 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."
- [60] 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>.
- [61] 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:

*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.*

- [62] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>23</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.*

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<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

<sup>23</sup> CIV-2011-485-000227 8 August 2011

- [63] 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 moderately complex. Adjustments based on the High Court decisions above are then made.
- [64] The Board's scale for a half-day hearing is \$3,500. The Respondent cooperated and accepted some wrongdoing. The Board has taken that into account and has reduced the costs order to \$2,500, which is the amount the Respondent is to pay toward the costs of and incidental to the Board's inquiry.

#### Publication

- [65] 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>24</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.*

- [66] 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.
- [67] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>25</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>26</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>27</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>28</sup>.
- [68] 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>29</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.
- [69] Based on the above, the Board will not order further publication.

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<sup>24</sup> Refer sections 298, 299 and 301 of the Act

<sup>25</sup> Section 14 of the Act

<sup>26</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>27</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>28</sup> *ibid*

<sup>29</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

[70] 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 \$2,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

[71] 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.

## Right of Appeal

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

Signed and dated this 28<sup>th</sup> day of June 2022



**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:

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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.*