

## Before the Building Practitioners Board

	BPB Complaint No. CB25690
Licensed Building Practitioner:	Scott Russell (the Respondent)
Licence Number:	BP 123618
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	Auckland
Hearing Type:	In Person
Hearing Date:	4 May 2022
Decision Date:	31 May 2022

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr C Preston, Chair  
Ms J Clark, Barrister and Solicitor, Legal Member  
Ms K Reynolds, Construction Manager

#### 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 \$1,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

**The Charges**

- [2] On 2 December 2021, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent in relation to building work at [OMITTED].
- [3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of a Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints regulations applies.
- [4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations. To this end, the Board issued a decision dated 24 December 2021 under regulation 9 (a) of the Complaints Regulations in respect of the allegations pursuant to section 317(1)(b) of the Act.
- [5] On the basis of the Registrar’s report, the Board resolved to investigate the Respondent’s conduct in relation to the allegations under section 317(1)(da)(ii) of the Act. Under regulation 10, the Board is required to hold a hearing in respect of that matter. In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers.

- [6] The Board did, however, note that there may be further evidence in the possession of persons involved in the matter. To that end, it issued a draft Board decision dated 24 December 2021. The Respondent was provided with an opportunity to comment on the Board’s draft findings and to present further evidence prior to the Board making a final decision.
- [7] On 19 January 2022, the Board received further submissions from the Respondent. He stated that he strongly disagreed with the draft decision and penalties and that he believed the draft decision to be unduly harsh. The Respondent alleged that *“the complaint seems to be largely misleading with false accusations. Also many of the dates relating to paperwork seem to be incorrect.”*
- [8] Given the submission, the Board resolved to hold an in-person hearing and to set aside the draft decision of 24 December 2021, including the Board’s indicative position on penalty, costs and publication.
- [9] The alleged disciplinary offences the Board resolved to investigate at a hearing were whether the Respondent had 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**

- [10] 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>1</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>2</sup>.
- [11] 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>3</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.”*
- [12] 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>1</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</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>4</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.*

- [13] 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.
- [14] 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**

- [15] 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.
- [16] 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**

- [17] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</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.
- [18] 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>4</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [19] In addition to the documentary evidence before the Board, it heard evidence at the hearing from:
- [OMITTED], Complainant; and
- [OMITTED], support person for the Complainant
- [20] The Respondent advised by email on 2 May 2022 that he would not be attending the hearing. (Document 7.2.1, Page 250 of the Board’s file). He stated:
- I believe nothing can be gained by it going ahead.*
- [21] The Respondent was asked if he wanted to revert to the Draft Decision but he advised he did not want to.
- [22] The Respondent was engaged by the complainant to reclad the exterior of the dwelling, install a new roof and new joinery, remove walls, and steel beams and install a new kitchen and bathroom. The work commenced on 17 April 2018 and came to an end on or about 17 May 2019. It was undertaken by a qualified carpenter and supervised by the Respondent.
- [23] The Complainant gave evidence that when the Respondent left the site there was further work required to obtain the Code Compliance Certificate. This included – some drainage, downpipes, balustrade on a Juliet deck (a separate glazier contract), paving, and door closures for the pool fencing.
- [24] The Complainant engaged another Licensed Building Practitioner in May 2019 to complete the work, and she stated that the Respondent knew this was happening.
- [25] By email dated 7 October 2020, the Complainant requested that the Respondent provide the outstanding record of work (Document 2.1, Page 30 of the Board’s file). His response on 15 October 2020 was – *“Yes that’s fine. How would you like to deal with the outstanding invoices?”* (Document 2.1, Page 32 of the Board’s file).
- [26] A final inspection record dated 16 December 2020 on the Territorial Authority building consent file stated - *“Inspector will try to help with getting PS3 from membrane installer and see if we can squeeze the record of work out of the carpentry LBP”* (Document 4.2, Page 107 of the Board’s file).
- [27] The Territorial Authority file was obtained on 7 October 2021, and it did not contain a record of work from the Respondent.
- [28] The Respondent made three statements on the issue of the record of work –
- (a) On 3 January 2021, *“I have delivered this to Val’s letterbox”* (Document 2.2, Page 37 of the Board’s file). No evidence as to when that occurred was provided.
- (b) On 19 January 2021, *“The restricted building works were not totally completed and there was some concern about the owner using my ROW to sign off work completed by another company. I issued the ROW as required by*

*the conditions of being a licensed building practitioner. I received an email from the homeowner on Wednesday 14<sup>th</sup> October 2020 at 3.38pm and responded on Thursday 15<sup>th</sup> October at 9.26am saying that was fine I would give her the ROW. I have no record of these emails. These have my name but not an actual email address. Also another ROW was supplied promptly when requested from the homeowner months later. This was for the Auckland City Council processor completing CCC.” (Document 5.2, Page 228 of the Board’s file)*

- (c) On 2 May 2022 – *“The regulation states that ROW must be supplied when restricted building work is completed, which we had not finished. Which we were completely committed to doing. [sic] This is supported with the client hiring others to do so. The work left was restricted building work which would require an LBP license and issuing a ROW. Which as far as I know my LBP licensed[sic] was used.” (Document 7.2.1, Page 250 of the Board’s file).*

[29] The Complainant acknowledged that a record of work dated February 2021 was placed in her letterbox in 2021 but that she could not recall exactly when.

#### **Board’s Conclusion and Reasoning**

- [30] 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.
- [31] 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>6</sup>.
- [32] 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.
- [33] The Board discussed issues with regard to records of work in its decision C2-01170<sup>7</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.

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<sup>6</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>7</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [34] 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.
- [35] 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>8</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [36] As to when completion will have occurred is a question of fact in each case. 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 on this project occurred in May 2019 when the Respondent knew that another Licensed Building Practitioner was completing the outstanding items need to obtain the code compliance certificate. Moreover, with the possible exception of the balustrade, the work to be completed was not restricted building work.
- [37] In past cases, the Board has held that where it becomes apparent that a licensed building practitioner will not be continuing, then their work will be considered to have been completed, and they will be required to provide a record of work soon thereafter. As such, the point in time had arrived when the Respondent knew or ought to have known that his restricted building work was complete and that a record of work was due.
- [38] To require otherwise would defeat the purpose of the record of work provisions in the Act, which are designed to create a documented record of who did what in the way of restricted building work under a building consent. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out. If a record of work is not provided because the intended work is not complete, then there would be no such record.
- [39] A record of work was not provided until some point in 2021, almost two years after the Respondent left the project. Even then, 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.
- [40] 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

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<sup>8</sup> [2018] NZHC 1662 at para 50

case will be decided by the Board on its own merits, but the threshold for a good reason is high.

- [41] In this instance, the Respondent made reference to outstanding invoices. (Documents 2.1 and 7.2.1, Pages 32 and 250 of the Board’s file). 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.
- [42] 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.
- [43] The Board finds that no “good reason” has been established for failing to provide the record of work.

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

- [44] 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.
- [45] The Board received evidence from the Respondent in his various submissions relevant to penalty, costs and publication and has made the appropriate orders based on the evidence received.

#### Penalty

- [46] 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>9</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.*

- [47] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>10</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>9</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>10</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.

- [48] 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

- [49] 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."
- [50] 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>11</sup>.
- [51] In *Collie v Nursing Council of New Zealand*,<sup>12</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.*

- [52] The Board's scale costs for a half-day hearing are \$3,500. This hearing was initiated by the Board after receiving the Respondent's submission on the draft decision. The Respondent did not explicitly request an in-person hearing. Given this, the Board has decided to reduce the costs to \$1,500.

### Publication

- [53] 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>13</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.*

- [54] 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

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<sup>11</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>12</sup> [2001] NZAR 74

<sup>13</sup> Refer sections 298, 299 and 301 of the Act

of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

- [55] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>14</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>15</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>16</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>17</sup>.
- [56] 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>18</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.
- [57] Based on the above, the Board **Will Not** order further publication.

### Section 318 Order

- [58] 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 \$1,500 (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.**

- [59] 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.

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

<sup>15</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>16</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>17</sup> *ibid*

<sup>18</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Right of Appeal

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

Signed and dated this 31<sup>st</sup> day of May 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:*
  - (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*
- (b) within any further time that the appeal authority allows on application made before or after the period expires.*