

## Before the Building Practitioners Board

	BPB Complaint No. CB25411
Licensed Building Practitioner:	Keith Whitlow (the Respondent)
Licence Number:	BP 134450
Licence(s) Held:	External Plastering – Proprietary Plaster Cladding Systems

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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 Type:	In person
Draft Decision Date:	23 September 2020

#### Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)  
Faye Pearson-Green, LBP, Design AOP 2  
Rob Shao, LBP, Carpentry and Site AOP 1  
Frank Thomas, LBP, Roofing

#### 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 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 \$2,000. An allegation of disrepute is not upheld on the basis that there was insufficient evidence to substantiate the claim.

### The Hearing

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

### The Charges

- [4] 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) 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

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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.

- in section 88(2) with a record of work, on completion of the restricted building work (section 317(1)(da)(11) of the Act); and
- (b) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

- [5] The Board noted, in its Notice of Proceeding, that the investigation into disrepute will be in respect of the allegation made by the Complainant that the Respondent may have wrongfully taken and used materials paid for by the Complainant.

### **Function of Disciplinary Action**

- [6] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

- [7] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>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.”*

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

- [9] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the

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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

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

conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

- [10] The above commentary on the limitations of the disciplinary process 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**

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

### **Evidence**

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [14] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [15] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Keith Whitlow	Respondent
[Omitted]	Complainant

- [16] The Respondent was engaged to carry out building work on an alteration 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 in November 2015 and came to an end on or about the end of June 2019.

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

- [17] The Respondent was not a licensed building practitioner at the commencement of the project. His initial role was arranging other contractors. He became licensed on 27 August 2018. He obtained his licence so that he could carry out external plastering work which was restricted building work. He has not provided a record of work for the restricted building work that he did carry out.
- [18] The building work under the consent passed a final inspection on 10 October 2019. After the final inspection, on 21 October 2019, the Respondent was asked by the owner (the Complainant) to provide a record of work. Several subsequent requests were made. A record of work was not provided. The Respondent did not reply to the requests. The Complainant stated that the Respondent stopped communicating when building and invoice issues were raised. The territorial authority, who required the record of work as part of the Code Compliance Certificate process, advised the Complainant that a certificate would be progressed if a complaint about the Respondent not providing a record of work was made.
- [19] The Respondent provided a written response to the complaint. He noted that he obtained a licence at his own cost so as to undertake the plastering work as other contractors proposed charges were too high. He noted that the work passed its inspections but that there was a payment dispute.
- [20] Following the issue of a Draft Decision, the Respondent provided further submissions. In an email dated 22 April 2020, the Respondent stated:

*I have not been asked for ROW; but yes all our records are at the house, including, still, some of our equipment that this person is holding onto, as well as substantial monies owed to us. All through the works, I trusted him to pay, and just billed in arrears for the materials and other companies I paid to do works there.*

- [21] On 10 June 2020, the Respondent provided written submissions. He noted the ethical manner in which he operates, issues with the build and, in respect of the provision of a record of work, that:

*We provided the owner a copy of the works that were done, as a ROW on site, and also way before that, in the form of very detailed timesheets and information on each days work that related to the works in question, as well as other works requested. In addition to that we also provided photos of each stage of the works that we regularly sent to the owner. Some of those timesheets are attached. All the required council paperwork is on site, along with the council plans and records of inspections etc.*

And

*From a legal technical point of view though, the works are not yet complete to the plastered wall, and the Act within its statutory provisions makes no stipulation of a time frame for this, only that it is provide "on completion of the restricted building work". The work is not completed, ( there are some*

*minor plaster and paint aspects) and we have every intention of providing any paperwork required after completion. As noted by Justice Muir in “MBIE v Bell (NZHC 1662 at para.50), “the only relevant precondition to the obligations of a licensed building practitioner under S 88 is that he/she has completed their work”*

*Thus, I maintain that this complaint is not warranted at all and was made purely on spiteful grounds, and is without substance as he knows full well he has the information already from us.*

- [22] At the hearing, the Respondent maintained that the restricted building work was not complete and that, accordingly, the requirement to provide a record of work had not arisen. He was questioned about the incomplete work. The Respondent gave evidence that gutters were leaking through a soffit and that a capillary gap between the deck and the cladding had to be increased.
- [23] The Complainant gave evidence that the guttering issue was minor and had been resolved as had the decking issue by the decking being chamfered back to create the required gap. The Respondent was of the opinion that the plaster cladding that he installed would have had to be cut back to create the gap as the deck had complex angles.
- [24] The Complainant gave evidence that whilst the Respondent was involved in the building work he had sought multiple final code compliance certificate inspections starting on 27 June 2019, which implied that the work was, as far as the Respondent was concerned, complete.
- [25] With respect of the allegation of disrepute, the Complainant gave evidence that materials that were on site when he visited the site would subsequently not be on-site and would not be incorporated into the build. He considered he was due credits for those materials. He gave an example of torch-on membrane and timber. The Respondent gave evidence that the torch on membrane was supplied by a contractor and that the Complainant was charged on a square metre rate based on what was used. He stated the timber was returned for a credit.
- [26] Following the completion of the hearing, the Respondent sought to provide further submissions. Whilst such submissions were not called for the Board, nevertheless considered them. The submissions dealt, in the main, with building code compliance.

#### **Draft Conclusion and Reasoning**

- [27] 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.

- [28] The Board has also decided that the Respondent **has not** conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [29] The Board’s decision that the Respondent did not contravene section 317(1)(i) of the Act was made on the basis that there was insufficient evidence on which to make a finding. In this respect, the Board notes that it must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*<sup>7</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

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

*[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

#### Record of Work

- [30] 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>8</sup>.
- [31] 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.
- [32] 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

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<sup>7</sup> [2009] 1 NZLR 1

<sup>8</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

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.

- [33] 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>9</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [34] 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.
- [35] On one view of the matter, completion occurred in June 2019 when the Respondent sought a final inspection for code compliance purposes. This is on the basis that, if the building work, including the restricted building work, was not complete, then the Respondent would not have sought a final inspection. It was also noted by the Board that the Respondent sought, during his engagement on the project, three final inspections.
- [36] On another, it could be stated that completion occurred on 10 October 2019 when the building work passed its final inspection. A final inspection is a record of the building work under the building consent having met building code requirements.
- [37] The Respondent was asked for a record of work on 21 October 2019. He did not respond to the request. He had no further interaction with the Complainant. He made no attempts to complete what he considered to be the incomplete work.
- [38] The Board also notes that a record of work is not the same as a producer statement. It is not a statement as to the quality or compliance of the restricted building work. Rather it is simply a list of who completed or supervised what in the way of restricted building work. As such, even if there were outstanding building code matters, they would not have impacted on the obligation to provide a record of work. Moreover, the issues were resolved without the Respondent’s involvement and, as noted, the building work has passed a final inspection.
- [39] On the basis of the above, the Board finds that the restricted building work was complete and that a record of work was due from as early as June 2019 when the Respondent sought a final inspection. A record of work has not been provided. The disciplinary offence has been committed.
- [40] Section 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is

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<sup>9</sup> [2018] NZHC 1662 at para 50

open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.

- [41] The Board notes that there is an ongoing dispute. There was some evidence to that effect that the record of work was being withheld. 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.

#### **Draft Decision on Penalty, Costs and Publication**

- [43] 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.
- [44] The matter was dealt with at a hearing. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further submissions relevant to the indicative orders.

#### Penalty

- [45] 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>10</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.*

- [46] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>11</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 have the advantage of simplicity and transparency. The court recommended adopting a

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<sup>10</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>11</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

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

- [47] 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. The Board sees no reason to depart from this starting point. The fine is set at \$1,500.

### Costs

- [48] 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."
- [49] 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>12</sup>.
- [50] In *Collie v Nursing Council of New Zealand*<sup>13</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.*

- [51] The Respondent required a hearing. The hearing did, however, take place by way of a video conference. The Board has taken that into account and has reduced its normal costs for an in-person hearing from \$3,500 down to \$2,000.

### Publication

- [52] 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>14</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.*

- [53] 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.

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<sup>12</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>13</sup> [2001] NZAR 74

<sup>14</sup> Refer sections 298, 299 and 301 of the Act

- [54] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>15</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>16</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>17</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>18</sup>.
- [55] 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>19</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.
- [56] Based on the above, the Board will not order further publication.

### Section 318 Order

- [57] 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 \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

**In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**

- [58] 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>15</sup> Section 14 of the Act

<sup>16</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>17</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>18</sup> *ibid*

<sup>19</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Signed and dated this 20<sup>th</sup> day of October 2020



**M.J. 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."*