

Before the Building Practitioners Board

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| | BPB No. CB25769 |
| Licensed Building Practitioner: | Zheng Zhou (the Respondent) |
| Licence Number: | BP 131965 |
| Licence(s) Held: | Carpentry |

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 | Board Inquiry |
| Hearing Type: | On the Papers |
| Hearing and Draft Decision Date: | 4 November 2021 |
| Final Decision Date: | 21 December 2021 |
| Board Members: | |
| | Mr C Preston, Chair (Presiding) |
| | Mr M Orange, Deputy Chair, Barrister |
| | Mr B Monteith, LBP, Carpentry and Site AOP 2 |
| | Mrs F Pearson-Green, LBP, Design AOP 2 |

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

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

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Summary of the Board’s Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$500.

The Charges

[2] On 4 November 2021, the Board received a Registrar’s Report following a Board Resolution to conduct a Board Inquiry into the conduct of the Respondent. The Inquiry arose as a result of a complaint made about another Licensed Building Practitioner who identified the Respondent as the person who had carried out or supervised restricted building work at [OMITTED]¹.

[3] Under regulation 22 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 21 of the Complaints Regulations applies.

[4] Having received the report, the Board decided that regulation 21 applied to aspects of the complaint but not to all of the allegations.

¹ Complaint number CB25619

Regulation 21 Decisions

- [5] The Board directed the Registrar to investigate allegations that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (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).

- [6] With regard to those allegations, the Board decided that regulation 21(d)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

(d) the investigation of it is—

(ii) unnecessary;

- [7] In considering whether the investigation of a matter is necessary, the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*², Justice Gendall stated, as regards the threshold for disciplinary matters:

[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.

- [8] Again, in *Pillai v Messiter (No 2)*,³ the Court of Appeal stated:

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

- [9] It is on the basis of the above matters and the facts as presented in the Registrar's Report and accompanying documentation that the Board has decided that it will not proceed with the allegations of negligence or incompetence.

² [2001] NZAR 74

³ (1989) 16 NSWLR 197 (CA) at 200

Disciplinary Offence to be Investigated

- [10] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that 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).
- [11] Under regulation 22, the Board is required to hold a hearing in respect of that matter.

Draft Decision Process

- [12] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures⁴. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation⁵. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [13] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [14] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, a draft decision was issued. 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. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [16] As noted above, the Board Inquiry arose as a result of a complaint about another Licensed Building Practitioner (LBP) (matter number CB25619). That LBP identified

⁴ Clause 27 of Schedule 3

⁵ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

the Respondent as the person into whom inquiries should be made as regards the provision of a record of work for restricted building work at [OMITTED], a new residential build carried out under a building consent. The file for CB25619 indicated that the building work started in December 2019 and came to an end on or about August 2020. The Complainant in CB25619 alleged that a record of work had not been provided on completion. The Council building consent file was obtained. On 30 September 2020, the Auckland Council confirmed it did not hold any records of work.

- [17] As a result of further inquiries into CB25619, a copy of a record of work from the Respondent dated 27 May 2020 was provided by legal counsel acting for the LBP in CB25619, who noted the record of work had been provided to the owner on 1 October 2020. Reference was also made to a commercial dispute. The record of work stated that the Respondent had carried out wall framing, roof framing, cavity installation and weatherboard installation.
- [18] The Respondent was provided with an opportunity to respond to the matters under inquiry but did not do so.

Further Evidence Received

- [19] As noted above, the Respondent did not engage in the investigation process. The cut-off date given to him for responding to the complaint was 17 June 2021.

- [20] On 1 December 2021, the Respondent emailed stating:

I recently received an email from the board office of LBP and realised that I did not reply to you for the inquiry mentioned. I can no longer access the link you sent previously but I read through the documents sent yesterday from the board office.

In this email I attached the RoW I sent to the project manager Christy on 27 May 2020. It was sent through by Wechat. I can provide you with a screenshot of the conversation if necessary. Please note only carpentry work on this form was done by me. I not only supervised the work done by my team member but also did most of the work by myself. The inspections were passed onsite. I don't believe there was any negligence while I worked on this project.

I also need to understand if the inquiry to me is solely in regards to the issue that no RoW was provided for [OMITTED] for the carpentry work I did. I did not reply to the email you sent through because I thought I talked to someone regarding the issue at [OMITTED] and we agreed that I am only the subcontractor responsible for the carpentry works. I did not carry out any work for the driveway.

Please contact my office admin Diana on [OMITTED] if you would like to talk about this issue. I am normally on construction sites and not able to talk over the phone during day time.

- [21] The Respondent was advised that, as the Board had made a Draft Decision, he could make submissions on the Draft Decision. The Respondent replied, restating the above.
- [22] The Board took the further evidence and submissions into account when making this Final Decision.

Conclusion and Reasoning

- [23] 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.
- [24] The further evidence received, and submissions made by the Respondent did not result in any changes being made to the Board's Draft Decision.
- [25] To clarify, in response to the query from the Respondent about the scope of this decision, the only finding is in relation to the failure to provide a record of work. The Board decided it would not carry out any further investigations into the quality or compliance of the building work.
- [26] As noted in the Draft Decision, 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 work⁷.
- [27] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.
- [28] The Board discussed issues with regard to records of work in its decision C2-01170⁸ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [29] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

- [30] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*⁹ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [31] 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. In the present matter, the Respondent’s record of work was dated 27 May 2020. That was the completion date. A record of work was not provided to the owner or the council till 1 October 2020. On that basis, the Board found, in its Draft Decision, that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [32] Following the issue of the Draft Decision, the Respondent contended that he had emailed the record of work to the project manager on 27 May 2020 and that he could provide copies of chat messages to support this.
- [33] The provision of a record of work to a project manager or main contractor does not satisfy the provisions of the Act. The Act requires that it be given to the owner and the Territorial Authority. The evidence clearly showed that the owner did not receive a record of work until 1 October 2020, and that that a record of work was not provided by the Respondent to the Territorial Authority. On that basis, the Respondent had committed the disciplinary offence.
- [34] The Respondent should note that whilst it may be common practice in some quarters of the building industry for records of work to be provided to main contractors, it is a practice that carries with it the risk that the record of work will not be passed on to the required recipients, the owner, and the territorial authority. This can occur for a variety of reasons, including as a result of a contractual dispute. If the main contractor does not pass a record of work on to the final recipients, it is the author of the record of work that will be held accountable by the Board, not the person or entity that they entrusted to fulfil their statutory obligation. It is also to be noted whilst, at times, a Respondent may not immediately know who the owner is, there are ways and means of ascertaining such details¹⁰ and that there should be no impediments to a record of work being provided to a Territorial Authority.
- [35] 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

⁹ [2018] NZHC 1662 at para 50

¹⁰ Ownership details of land are available on public registers.

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.

- [36] In this instance, there was an ongoing commercial dispute. It appears the Respondent was not a party to that dispute and that the main contractor was withholding his record of work as a result of it.
- [37] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Penalty, Costs and Publication

- [38] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [39] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision as regards penalty, costs, and publication.

Penalty

- [40] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹¹ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [41] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹² 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 starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [42] Record of work matters are at the lower end of the disciplinary scale. The Board’s normal starting point for a failure to provide a record of work is a fine of \$1,500, an

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹² 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

amount which it considers will deter others from such behaviour. There are no aggravating or mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

- [43] The Respondent's post Draft Decision submissions did not raise any factors that warrant any change to the penalty decision.

Costs

- [44] 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."

- [45] 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 case¹³.

- [46] In *Collie v Nursing Council of New Zealand*,¹⁴ 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.

- [47] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁵ 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.

- [48] 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.

¹³ *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.

¹⁴ [2001] NZAR 74

¹⁵ CIV-2011-485-000227 8 August 2011

The current matter was simple. Adjustments based on the High Court decisions above are then made.

- [49] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [50] 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 Act¹⁶. 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.

- [51] 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.
- [52] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁸. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁹. 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*²⁰.
- [53] 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 interest²¹. 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.
- [54] Based on the above, the Board will not order further publication.

¹⁶ Refer sections 298, 299 and 301 of the Act

¹⁷ Section 14 of the Act

¹⁸ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁰ *ibid*

²¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[55] 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 \$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.

[56] 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

[57] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱ.



Mr C Preston
Presiding Member

ⁱ 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."*

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.*