Before the Building Practitioners Board

	BPB Complaint No. C2-01785
Licensed Building Practitioner:	Lance Raymond (the Respondent)
Licence Number:	BP 120233
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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	5 June 2018
Decision Date:	25 June 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Catherine Taylor, Lay Member

Procedure:

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

Board Decision:

The Respondent **has** committed disciplinary offences under section 317(1)(b) and 317(1)(da)(ii) of the Act.

Contents

Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (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

[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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

[2] 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*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[3] 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*[4] 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."*

[4] 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. It does not have any jurisdiction over contractual matters.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

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

Lance Raymond	Respondent
[Omitted]	Complainant
John Rennie	Technical Assessor
[Omitted]	Summonsed witness, [Omitted]
[Omitted]	Witness for the Respondent, [Omitted]
[Omitted]	Character witness for the Respondent

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[7] The Respondent was engaged by the Complainant to undertake renovations to an existing dwelling and a re-clad of it. The building work was undertaken under a building consent and it included restricted building work. The Respondent's engagement was under a labour only contract. The Respondent presented a written contract part way though the project. It was not executed.

[8] The work commenced on or about 13 April 2016. It was finished on or about 19 January 2017. In February 2017, following a rain event, water entered a downstairs room resulting in an insurance claim to replace carpets. Following remediation efforts a dispute arose. The Complainant requested a record of work. One was not provided. A Complaint was made. The Complaint raised three matters:

(a) failure to construct a wall and to waterproof it in accordance with the building consent in that a waterproofing membrane applied to the rear of a retaining wall and the sub-surface drainage installed were completed in a defective manner allowing moisture to penetrate the property causing damage;

(b) negligence in the construction of a ramp and steps such that they are unsafe to use; and

(c) failure to provide a record of work on completion of restricted building work.

[9] The Board appointed a Technical Assessor to review the documentation and provide an opinion on the building work.

[10] The relevant sequence of events as regards the leaks was that the wall that leaked was constructed to the windowsill level. The base of the wall adjoined existing foundations. Two coats of Sika Blackseal Elastic Damp Proof membrane were applied up to the level where the sill block level by the Complainant. A nova coil drain within a filtration sock was installed at the base of the wall on the existing foundations which did not have a damp proof membrane. The drain was at the same level as the base of the wall. The building consent detailed it as being lower than the base of the wall. Polystyrene was placed over the Sika membrane and clean backfill was installed.

[11] The evidence of the Complainant and the Respondent differed as to whether the Council inspected the tanking and drain prior to it being backfilled. The Respondent maintained that the polystyrene was in place but that there was no backfill when an inspection occurred. The Complainant's evidence was that he was present at the premises most of the time and that it was not inspected prior to it being backfilled. The Council documentation before the Board did not assist.

[12] The area adjacent to the walls was then prepared for a concrete path and a landing in front of a door access. The area was filled with a base course and concrete was poured. The finished level of the base course was higher than the Sika membrane.

[13] Following the water ingress into the house in February 2017 the concreted area was lifted and the fill removed. The fill above the drain was noted as being dry. The Complainant removed the last of the fill around the drain. He stated it was wet.

[14] The Complainant engaged a neighbour who was an authorised waterproofing applicator to apply further waterproofing reported to be a torch on bituminous membrane that extended full height and returned 300mm along the top of the existing slab and footing before being terminated with a metal termination bar. A producer statement for this work was provided.

[15] Since the completion of the new tanking no further leaks have been identified.

[16] The Complainant's evidence, and that of the Respondent as regards the Complainant carrying out the first tanking, differed. Irrespective of those differences the Respondent's position was that as the tanking had been completed by the Complainant he had no responsibility for any failure of it. The Respondent did accept, however, that he should have noticed that the tanking needed to be extended when the concreted areas were being formed.

[17] The Respondent gave evidence that he had some experience with waterproofing membranes and that he had been an authorised applicator for a product (not Sika) in the past but was not presently an authorised applicator for any products.

[18] The ramp and steps that were constructed were to allow for disability access for a family member. The Complainant alleged the Respondent suggested a ramp be constructed. The Respondent stated he advised against a ramp as there was insufficient space to install a safe ramp unless trees were removed and that the Complainant would not allow their removal. The ramp rose approximately 750mm over a three-metre length.

[19] The Complainant's issue with the steps was that the final landing area was uneven making the steps dangerous to use.

[20] The Technical Assessor' report noted the following:

> ***Waterproofing***
>
> *The detail sections of the retaining walls included on the structural engineering drawings (dwg S301) … show a dashed line to infer the installation of waterproofing but annotate that it is to be to the architect's design. The architectural plans however do not show or detail any waterproofing measures, and nothing is included within the specification document included in the consent.*
>
> *There was no information on the consented drawings or specification on what waterproofing product was to be used, or how it was to be installed and lapped with any floor DPM. We are of the opinion that the respondent, or the waterproofing installer (in this case the complainant) ought to have identified*

this absence of information and requested further clarification or detail from the designer before proceeding with the works.

Drain

NZS 4229:2013 (Concrete masonry Buildings) Section A5.1 requires a perforated or porous pipe of 100mm diameter shall be laid to a minimum fall of 1:150 and the invert at the highest point shall be a minimum of 50mm below the concrete floor slab level.

The position of the draincoil at the rear of the retaining wall may not alleviate sufficient water pressure build-up to the rear of the wall, and therefore the critical junction at the base of the tanking membrane may remain under pressure from ground water at times. Despite this the information provided by both the respondent and the drainlayer suggest that this is not occurring as confirmed by the fact that the back-filled materials were found to be dry when excavated.

As the original footing and floor slab was retained in place and only cut to accommodate the new wall footing or slab thickening, it has not been possible to situate the draincoil below the floor slab level as per the structural engineering drawings. The sub-surface drainage at this location therefore does not comply with the Building Consent.

We are of the opinion that the existing footings and slab ought to have been removed to the extent that any new sub-surface drainage could be accommodated at a level below the floor slab. We have been unable to confirm why the removal of the existing footings and slabs was not undertaken.

[21] The Technical Assessor expressed his opinion that:

There was non-compliance with Clause E2: External Moisture of the New Zealand Building Code during the design and construction of the retaining wall that allowed moisture penetration. The penetration of moisture appears to have been the result of the inadequately installed membrane.

[22] The Respondent was questioned as to whether he consulted with the designer or engineer when it was ascertained that the drain could not be installed below the concrete slab floor level. He did not. Nor did he consult with the engineer or the building consent authority or process a minor variation for it and that he would only have done a minor variation if the Council asked for one. The Respondent stated the engineer did see the drain as installed and did not raise any issues with it. He also stated that the Complainant did not want to expend funds on the machinery and time required to cut a channel in the existing foundations. The Complainant refuted this.

[23] The Respondent also expressed his opinion that the depth of the drain was not an issue as it had been shown that the height of the tanking was the cause of moisture ingress. The Technical Assessor noted that it is not advisable to rely solely on the waterproofing membrane and that there would be residual moisture around the base of the drain and therefore around the base of the wall and that this was why it would have been better if the drain is situated lower than the base of the wall.

[24] With regard to the lack of detail on the plans and specifications as to the type of waterproofing membrane to be used the Respondent stated that he just used what had worked in the past and what had been used in other areas of the build. He relied on his experience and knowledge. He further stated that he did not know that the product would not be warranted if an approved applicator did not install it and that he had not realised that a producer statement for tanking would be required and that one had not been required on other jobs he had been involved with.

[25] With regard to the ramp and stairs the Technical Assessor noted they did not form part of the building consent but that under section 17 of the Act they still had to meet the requirements of the building code.

[26] The Complainant stated, as regards the record of work, that if the Respondent had provided one when requested he would not have made the complaint. The evidence before the Board was that the building work was completed on or about 19 January 2017. A record of work dated 27 September 2017 was in the documentary evidence.

[27] The Respondent's written response noted:

> *As far as refusing the R.O.W. this is another one of his lies. I have never refused this request. I stopped taking calls from him because I was sick of his attitude and his wanting work done for nothing. The R.O.W. has been completed.*

[28] The Respondent gave further evidence at the hearing that he did not provide the record of work as there were issues with the leaks and he considered the work was not finished.

[29] The Respondent's character witness spoke of a re-clad project that he had undertaken for him noting that the work was done to a high standard and that there were no issues with the build.

Board's Conclusion and Reasoning

[30] 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); and

(b) 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] The Board has decided that the Respondent **has not** 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).

[32] The reasons for the Board's decision follow.

Negligence and/or Incompetence

[33] The findings of negligence relate to the Respondent's failure to ensure the tanking was carried out correctly, the failure to ensure changes to the building consent were dealt with in the appropriate manner and the manner in which the ramp was installed. The Board has not made a finding with regard to the stairs as it considers the matter was not sufficiently serious enough to warrant a disciplinary outcome. The legal principles with regard to seriousness are outlined below.

Legal Principles

[34] 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*[6] test of negligence which has been adopted by the New Zealand Courts[7].

[35] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[8]. 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.

[36] 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[9]. 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[10].

[37] The Board notes that the purposes of the Act are:

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[6] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

[9] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

[10] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> ***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.*

[38] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[11] and be carried out in accordance with a building consent[12]. 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.

[39] Turning to seriousness in *Collie v Nursing Council of New Zealand*[13] 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.*

Waterproofing

[40] The Board notes the opinion of the Technical Assessor that the building work was not restricted building work:

> *The installation of a waterproofing does not fall within the normal licensing classes for Restricted Building Work (RBW) and therefore it is considered that the installation of the waterproofing membrane did not need to be undertaken by or be supervised by an LBP. This view has been confirmed within a determination provided by MBIE (determination ref: 2014/064).*

[41] The Board does not agree. Waterproofing is restricted building work and as such it has to be carried out or supervised by a licensed building practitioner.

[11] Section 17 of the Building Act 2004
[12] Section 40(1) of the Building Act 2004
[13] [2001] NZAR 74

[42] The Technical Assessor's opinion was based on Determination 2014/064. It should also be noted that whilst a determination is binding between the parties it does not necessarily have a wider effect. In *Weaver v HML Nominees Ltd*[14] the High Court held that a determination decision is a judicial decision for the purposes of considering whether an issue estoppel applied between the parties preventing them from re-litigating the matter. The High Court further held, however, that although the determination was binding on the parties there was no issue estoppel broader in scope than that. The Board therefore considers that determinations are influential and are to be taken note of but the Board is not bound to follow decisions made within them.

[43] The Board made the same findings as regards restricted building work in Complaint Decisions C2-01307 and C2-01649. Full reasoning was provided in those decisions.

[44] The Building (Definition of Restricted Building Work) Order 2011 establishes what is restricted building work. Clause 5 of the Order stipulates:

> *5 Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
>
> *(1) The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
>
> *(2) This clause applies to building work that is—*
>
> *(a) the construction or alteration of—*
> *(i) the primary structure of a house or a small-to-medium apartment building; or*
> *(ii) the external moisture-management system of a house or a small-to-medium apartment building; and*
> *(b) of a kind described in subclause (3); and*
> *(c) of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
>
> *(3) The kinds of building work referred to in subclause (2)(b) are—*
>
> *(a) bricklaying or blocklaying work:*
> *(b) carpentry work:*
> *(c) external plastering work:*
> *(d) foundations work:*
> *(e) roofing work.*

[45] On the basis of the Order there are three requirements which need to be met for building work to be restricted building work. Dealing with each as they relate to the case before the Board:

[14] [2013] NZHC 2080

(a) it must relate to the construction or alteration of the primary structure or the external moisture-management system of a house or a small-to-medium apartment building. The tanking related to external moisture management system of the home;

(b) be of a kind described in subclause (3) of the Order. Subclause (3) includes in (3)(b) carpentry and as such this element is also satisfied; and

(c) be of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.

[46] Section 285 of the Act allows for licence classes to be designated by regulation. The designation is contained in clause 4 of the Building (Designation of Building Work Licensing Classes) Order 2010. It creates a class of licence for Carpentry and stipulates it covers "*carpentry for any building that is ... category 1, 2 or 3*". The Respondent is licensed in Carpentry and as such the third element of the test is satisfied.

[47] Determination 2014/064 came to the conclusion that tanking was not restricted building work on the basis that the Licensed Building Practitioners Rules 2007 (the LBP Rules) did not include a competency within the licence classes for tanking. The Rules, however, are for the purpose of evaluating whether or not an applicant for a licence meets the applicable minimum standard when seeking a building licence. They do not determine what is and is not restricted building work and cannot be read in such a way as to limit what has been declared as restricted building work.

[48] This also accords with the general principle of statutory interpretation that general provisions do not derogate from specific ones[15]. In this respect the Licensed Building Practitioners Rules 2007 are general in their nature whereas the Building (Designation of Building Work Licensing Classes) Order 2010 and Building (Definition of Restricted Building Work) Order 2011 are far more specific in their provisions and should be preferred.

[49] Finally the Board does not consider that Parliament would have intended that building work that is critical to the structure or weathertightness of a household unit should be carried out or supervised by anyone other than a licensed building practitioner. The licensing classes were left deliberately open rather than prescriptive so that structural and weathertightness work would then fit within the most appropriate licensing class. In essence the restricted building work provisions should be interpreted in such a way so as to advance the purposes of the legislation, not in such a way as to defeat them and the protections they offer the consumer.

[50] Having found that the tanking was restricted building work and that it therefore had to be completed or supervised by a licensed building practitioner the Respondent, as the licensed building practitioner, is responsible for its completion. In essence he is deemed to have supervised it.

[15] Refer Burrows and Carter Statute Law in New Zealand 5th ed 2015 page 475

[51] The work was carried out in such a way that it failed to meet the requirements of clause E2 of the building code. Moreover, it was carried out in such a way as to void any manufacturer's warranty that may have applied to the product as it was not applied by a licensed applicator. The Respondent had previous experience as a licensed applicator of a tanking product and, as such, should have known that it was a requirement for the tanking to be installed by a licensed applicator.

[52] The Board also considers that the Respondent should have taken appropriate steps to extend the tanking above the line to which it was installed when solid fill and concrete were installed in the area.

[53] Finally, the Respondent should have consulted with the designer with regard to the specifics for the waterproofing membrane. In failing to do so he has become the designer, which, as a licensed building practitioner with a carpentry licence, he cannot do. The Building Act and the licensing regime exist to ensure that what is to be built and how it is to be built is clearly defined so as to ensure the purposes of the Act and the provisions of the building code are met. The Respondent, in failing to consult and seek instructions, has put this regime at risk.

[54] 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, as such, has been negligent.

Nova Coil Drain

[55] The second aspect of the building work that relates to negligence is the installation of the nova coil drain. The plans clearly showed that it was to be installed below the level of the wall. It was not. The result is that the effectiveness of the drain has been compromised.

[56] The Respondent had a duty, if the drain could not be installed in accordance with the consented plans, to consult with the designer and/or the building consent authority to establish if the proposed change would still meet building code compliance requirements. This should have been done by way of an application for a minor variation. The Board notes the Respondent's stated position that he only applies for a minor variation if the building consent authority requests one. It is not for the building consent authority to spot changes to the building consent. A licensed building practitioner has a positive obligation to the bring them to its attention. Section 89 of the Act states:

> ***89 Licensed building practitioner must notify building consent authority of breaches of building consent***
>
> *(1) A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
> *(a) the territorial authority in whose district the building is situated; and*

(b) the owner.

(2) The notification must—

(a) state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and

(b) state how the building work does not so comply; and

(c) be given as soon as practicable after the licensed building practitioner forms that view.

[57] The Respondent has not fulfilled his duty. In failing to do so and failing to consult with the designer and installing the drain in the way that he did the Respondent has departed from what the Board considers to be an accepted standard of conduct and thereby has been negligent.

Ramp

[58] The evidence differed as to whether the ramp was the Respondent's idea or the Complainant's idea. Irrespective of whose idea it was under section 17 of the Act the building work had to comply with the building code:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

[59] The building code contains provisions in Clause D1 as regards Access Routes. Included in objectives are safeguards from injury during movement into and out of buildings.

[60] Acceptable Solution D1/AS1 is a means by which compliance with Clause D1 of the building code can be complied with. It notes a preferred angle of 7 degrees and a maximum angle of 18 degrees, a maximum acceptable slope of 1:12 for an accessible ramp and 1:10 for a common ramp subject to wetting. The ramp in question rose approximately 750mm over a three-metre length. This is a slope of 1:4 which exceeds the requirements. There was also no evidence that anti slipping provisions had been put in place.

[61] Whilst an acceptable solution is not the only means by which compliance with the building code can be achieved there was no evidence before the Board that the ramp would have complied and given the extent of the departure from the acceptable solution the Board finds that it would not have complied.

[62] Given the above the Board finds that the Respondent has again fallen below the acceptable standards in constructing the ramp in the manner that he did.

Seriousness

[63] The Board has found three grounds on which the Respondent has been found to have been negligent. It considers that each were sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

[64] The Board notes that building work was carried out that did not comply with the building consent, in particular the installation of the nova coil drain. The Board has, however, made findings with regard to this under section 317(1)(b) in the context of negligence. As such the Board does not consider it necessary to also make a finding on the same matter under the disciplinary ground of carrying out building work that is contrary to a building consent.

Record of Work

[65] 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[16].

[66] 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.

[67] The Board discussed issues with regard to records of work in its decision C2-01170[17] 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.

[68] 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.

[69] 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 …".

[70] The building work was completed in or about 19 January 2017. The Board was provided with a record of work dated 27 September 2017. The Respondent's initial response as regards a record of work and his evidence at the hearing did not match. The evidence at the hearing that the delay was because the work was not complete is not accepted. The Respondent's position was that the tanking had nothing to do with him. As such this should not have been an impediment. Moreover if incomplete work had been the reason then the Board would have expected this to be stated at the time he made a response to the complaint.

[16] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[17] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

[71] As a record of work was not provided until well after completion the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[72] 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. The possible good reasons have already been discussed and dispensed with.

Penalty, Costs and Publication

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

[74] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[75] 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*[18] 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.*

[76] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[19] 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 penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[18] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[19] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[77] The Respondent has been found to have committed two disciplinary offences. Negligence is a serious matter. The Board notes, however, that the negligence was at the lower end of the scale. The Respondent's competence has not been called into question. The Board considers that a fine is the appropriate penalty. The record of work disciplinary offence is one that is at the lower end of the disciplinary scale. The Board's normal penalty for a failing to provide a record of work is a fine.

[78] Based on the above the Board's penalty decision is that the Respondent pay a fine of $1,500. The Respondent should note that the normal starting point for a record of work matter alone is $1,500 and that the overall fine would have been greater had it not been for the mitigation present including the overall circumstances of the Respondent's engagement in the project.

Costs

[79] 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."

[80] 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[20].

[81] In *Collie v Nursing Council of New Zealand*[21] 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.*

[82] Based on the above the Board's costs order is that the Respondent is to pay the sum of $1,500 toward the costs of and incidental to the Board's inquiry. This is a minimal amount and far less than 50% of actual costs given that a Technical Assessor was appointed.

Publication

[83] 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[22]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

[20] *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.
[21] [2001] NZAR 74
[22] Refer sections 298, 299 and 301 of the Act

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.

[84] 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.

[85] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[23]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[24]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[25]. 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*[26].

[86] 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[27]. 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.

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

Section 318 Order

[88] 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(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.**

[89] 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.

[23] Section 14 of the Act
[24] Refer sections 200 and 202 of the Criminal Procedure Act
[25] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[26] ibid
[27] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

[90] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **17 July 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 25th day of June 2018

Chris Preston
Presiding Member

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[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.