Before the Building Practitioners Board

	BPB Complaint No. CB24674
Licensed Building Practitioner:	Steven Diskin (the Respondent)
Licence Number:	BP 114877
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	Greymouth
Hearing Type:	In Person
Hearing Date:	15 May 2019
Decision Date:	25 June 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
David Fabish, LBP, Carpentry Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Nichola Donovan, Barrister and Solicitor, Connors Legal

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 a disciplinary offence under section 317(1)(b), 317(1)(d) and 317(1) (da)(ii) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(i) 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);

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and

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

(d) conducted himself or herself 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).

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.

Background to the Complaint

[5] The Complainant set out the following issues which were relevant to the Board's investigations that:

(a) the house was not correctly positioned. That there was verbal instruction that the house should be positioned to allow a trailer to go behind the house. That the original plans showed the house was only 1 meter from the boundary and that this was amended to 1.5 meters from the boundary to accommodate in-situ drainage without proper consultation with the Complainant;

(b) there was significant cracking of the concrete floor slab. That building work had commenced on the floor slab which did not allow enough time for the concrete to cure and that due to the lack of watering during a hot time of the year the slab dried too quickly. The position of the slab cuts was not in line with the building consent and one in the garage was missing;

(c) the roofing cladding was consented as Hi Rib Max when Endura trapezoidal five rib style surface fixed was supplied and installed;

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[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

(d) pipes for the sewage and waste have been installed below the floor slab which was not consistent with the consented plans; and

(e) a Council stop work notice was issued as a result of there being no perimeter safety fence.

[6] A Technical Assessor appointed by the Board also undertook an inspection and raised several other issues:

(a) compromised floor/ground level and cladding to ground clearances;

(b) exterior joinery (windows) not installed according to consented plans or manufactures technical information or E2/AS1; and

(c) eave detailing fails to conform to consented plans or manufactures technical information or E2/AS1 and eave overhangs varied in places to the consented plans.

Evidence

[7] 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.

[8] 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 the available evidence.

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

Steven Diskin	Respondent
[Omitted]	[Omitted] (excavating and fill)
[Omitted]	[Omitted] (engineering)
[Omitted]	Builder foreman on the Job (non-LBP)
Warren Nevill	Technical Assessor
[Omitted]	Complainants

[10] The Respondent confirmed that the set out for the excavation had been undertaken by himself and was to the floor size as set out in the plans. He accepted that this was an error and that the set out for excavation should have 1 meter from the edge of the foundation and in accordance with the engineer's design.

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

[11] Evidence was presented by [Omitted] regarding the excavation and the filling and compacting of the site. He accepted that he did not double check the set out for the excavation but relied on the set out as provided by the Respondent. He confirmed that the fill was batted back at the edges and that it was compacted in layers and additional fill was supplied to raise the foundation and slab to the required height.

[12] [Omitted] gave evidence that he had visited the site to observe the excavation, filling and compacting and was satisfied that this was done to the required engineering standards. He did not check the site layout but relied on that being done by the Respondent. He confirmed that compaction had been done correctly. His observations were relayed to [Omitted], the contracted engineering firm, who had subcontracted him to undertake the engineering observations and they subsequently provided a PS4.

[13] Both the Respondent and the Complainant confirmed that both [Omitted] and the engineering oversight was organised and paid for by the Complainants. The Respondent had nothing to do with the foundation excavation and fill (other than the set out) and he confirmed that he did not check to insure the suitability of the fill compaction at the edges of the foundation slab.

[14] The concrete was supplied by [Omitted], who were subcontracted to the Respondent. [Omitted] claimed in his evidence that the concrete was to the required specification as specified in the consented plans.

[15] Photo evidence shows wheelbarrows on the slab site as concrete was being placed. [Omitted] gave evidence that there were mesh chairs that had been moved but that they were repositioned.

[16] There was conflicting evidence from the Complaint and Respondent as to the time allowed for the concrete slab to cure and the use of sprinklers to help the curing process. The Complainant considered the steps taken were inadequate. The Respondent disagreed.

[17] The Technical Assessor was able to confirm that it was very hot and dry time of the year based on data from NIWA. He referenced photos that showed framing on the foundation in place three to four days after the concrete was poured. The Board notes, however, the dates on the photos are not those imposed by the camera itself but that they were manually added. Evidence from a neighbour in the form of a signed statement says that sprinklers were used.

[18] The Technical Assessor did revisit the site on the morning of the hearing. He observed that cracking had not expanded from his earlier observations and remained relatively small in width at approximately 4mm wide.

[19] The Respondent and Complainant could not agree on the question of the proposed positioning of the house or further discussions as regards the amendment from the consented plans to move the house from being 1 meter from the boundary to 1.5 meters from the boundary.

[20] The Board was provided with evidence of the original consented drawings which showed 1 meter and then the change to the consented drawing which showed 1.5 meters. It was unclear as to the level of consultation that was undertaken with the Complainants for this change.

[21] The roof cladding is specified and noted on the consented plans as "*selected Hi Rib long run coloursteel roofing*" with the additional inclusion "Max" on the plan notations.

[22] The Technical Assessor believed the "Max" refers to Coloursteel product "maxx" a product providing corrosion protection intended for exposed and coastal situations.

[23] The Respondent confirmed that the drawings had been undertaken by his designer and submitted to the Council and approved.

[24] The Respondent claims that the product change was an oversight. He claimed he then had discussions with a Council inspector and had verbal agreement that this could be changed to Endura Colorsteel as this was adequate for the area and that the change would be covered off later with a minor variation to the consent. There was no evidence of this agreement on the council file or of a minor variation being processed.

[25] The Respondent claimed this change to the consented plans along with others were in progress and would have formed part of a minor variation had he been allowed to complete the work.

[26] It was unclear if this change had been communicated to the Complainants.

[27] There were no roof edge flashing as per the consented plans and the roofing material was not turned down into the guttering.

[28] Changes to wastewater and sewage to go under the floor slab were agreed to with the plumber and then with a Council inspector on site. The plumber was a subcontractor to the Respondent. The work has been signed off by way of an inspection pass by the Council.

[29] It appears the Complainants have not been consulted about this change.

[30] In terms of the change to the building consent, the Respondent advised he had a discussion with a Council inspector (unnamed) and that it had been verbally agreed that this change could also take place and was subsequently signed off by the Council. There was no evidence of this agreement on the council file or of a minor variation being processed. The Respondent confirmed no amendment to the consent had yet been made, but that one was in progress.

[31] In respect to the stop work notice issued by the Council for the lack of a perimeter fence, the Respondent confirmed that he had started work knowing that the fence was not in place but said that it had been ordered.

[32] The Board noted the lack of fall protection on site, evidenced in a photo of a person working on the top of the wall framing.

[33] Evidence was provided by the Technical Assessor showing "*inadequate ground clearance of the cladding*". This would be a breach of the Building Code and not in accordance with the manufacture's specifications.

[34] The foreman gave evidence that this was the result of the cladding being installed from the top of the windows to give an ascetically pleasing look and that the ground clearance issue would have been sorted had they been allowed to complete the work.

[35] The Technical Assessor gave evidence that "*the windows in both cladding types have not been installed in accordance with the consented plans, the manufactures specifications nor guideline details offered within E2/AS1".*

[36] The gaps at the window facing level were less than the required 5mm and that there was no evidence of in-seal strips behind the window facings. The Respondent gave evidence that in the case of the in-seal strip he would have used silicon beading if he had been allowed to complete the work.

[37] The Technical Assessor also gave evidence that "*the upper roof metal negative eave/wall junction flashing has not been installed in accordance with the consented plans".* Again the Respondent claims this would have been completed, had he been allowed to finish the work.

[38] The Technical Assessor provided a useful timeline which highlighted the following:

(a) Building work commenced before the Building Consent was issued;
(b) Engineering approval was provided for the foundation fill and compaction;
(c) Waste pipe inspection passed by Council;
(d) Floor slab inspection passed by Council;
(e) 7 March 2018 was the approximate date that Mr Diskin was requested to leave the site; and
(f) A complaint was lodged 27 August 2018

[39] A record of work has not yet been provided. Council for the Respondent made submissions that he had good reasons in that "*he was still shown on the building consent as the LBP for the job, he has not been asked for one by complainant or the Council, that there have been other people who have done work and it is unclear if any of his work was changed, that he was not able to complete the flashings and that remedial work was required".*

Board's Conclusion and Reasoning

[40] The Board has decided that the Respondent **has**:

(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);

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)

and should be disciplined.

[41] The Board has decided that the Respondent **has not** conducted himself or herself 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).

[42] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

[43] Negligence and incompetence are not the same. In *Beattie v Far North Council*[6] Judge McElrea noted:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

[44] 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*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[45] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others*[9] it was stated as *"an inability to do the job"*.

[46] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[10]. 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.

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[6] Judge McElrea, DC Whangarei, CIV-2011-088-313

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

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

[9] Ali v Kumar and Others [2017] NZDC 23582 at [30]

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

[47] 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[11]. 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[12].

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

> ***3 Purposes***
> *This Act has the following purposes:*
> *(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
> *(i) people who use buildings can do so safely and without endangering their health; and*
> *(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
> *(iii) people who use a building can escape from the building if it is on fire; and*
> *(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
> *(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[49] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[13] and be carried out in accordance with a building consent[14]. 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.

[50] Turning to seriousness in *Collie v Nursing Council of New Zealand*[15] 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.*

[11] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[12] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[13] Section 17 of the Building Act 2004
[14] Section 40(1) of the Building Act 2004
[15] [2001] NZAR 74

[51] There was conflicting evidence regards the positioning of the house. The Board believes that as soon as the boundary drainage issue had been uncovered and the decision was made to move the house from 1 meter to 1.5 meters from the boundary line, documented approval should have been obtained from the Complainant. Moving the location of a house on the property is a major change and needs to be well recorded and signed off. No evidence of this was provided to the Board.

[52] The Respondent did not subcontract or pay for the engineering nor the excavation, filling or compacting of the foundation site. If there are issues with these aspects, they need to be taken up directly with the Complaints sub-contractors by the Complainant. The Board has no jurisdiction over the subcontractors.

[53] The Respondent did have control over the set out of the site for excavation. He accepts that he did this to the floor size, and therefore the sub floor compacted hard fill appears to be less than 1 meter from the edge of the foundation in places. This should have been checked.

[54] The Board accepts that the floor slab was cracked and there were more cracks than expected. However, cracking is not unusual and in this case the cracks were not excessive in width and did not appear to be getting bigger.

[55] The roof cladding was shown on the plans as Hi Rib Long Run Colorsteel “Max”. The plans and specification were compiled by the Respondent’s designer and approved by Council.

[56] No evidence was provided to the Board that there had been a discussion with Council to change the cladding to Endura. There was no proof of a discussion with the Complainant as regards to the proposed change.

[57] This is a significant change and, in the Board’s view, it should have been signed off by the Complainant and an amendment to the building consent made. Work should have stopped on the roof until an amendment had been approved and issued. The change was more than that which could have been dealt with by way of a minor variation.

[58] The roof was not installed to the consented plans, as there was no fold down of the roofing material into the guttering and no edge under flashing.

[59] The Board notes that the building work commenced prior to the issuing of the building consent. Such a practise risks the possibility of a building consent not being approved and undermines the intention of the Act that work should be done to an issued building consent.

[60] Health and Safety on site is important. Work should not commence until safety fencing is in place and work at height is not allowed unless fall protection is provided. Health and safety requirements form part of the Building Code.

[61] In the case of ground clearance issues with cladding the Board accepts this may have been corrected later, however it is of the view that this is both inefficient and does not make sense in terms of the sequencing of the work.

[62] The windows were not installed as per the consented plans and specifications and the in-seal strip had been missed and would require significant rework to install.

[63] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

[64] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. Section 40 of the Act provides:

> ***40 Buildings not to be constructed, altered, demolished, or removed without consent***
>
> *(1) A person must not carry out any building work except in accordance with a building consent.*
>
> *(2) A person commits an offence if the person fails to comply with this section.*
>
> *(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.*

[65] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

> ***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.

[66] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[67] In this respect section 45(4) of the Act states:

(4) An application for an amendment to a building consent must,—

(a) in the case of a minor variation, be made in accordance with section 45A; and

(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.

[68] Section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably

45A Minor variations to building consents

(1) An application for a minor variation to a building consent—

(a) is not required to be made in the prescribed form; but

(b) must comply with all other applicable requirements of section 45.

(2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.

(3) A building consent authority that grants a minor variation—

(a) must record the minor variation in writing; but

(b) is not required to issue an amended building consent.

[69] In *Tan v Auckland Council*[16] the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes

[16] [2015] NZHC 3299 [18 December 2015]

> *described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[70] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[71] Justice Brewer in *Tan* also noted:

> *[37] … those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
>
> *[38] … In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[72] Given the lack of amendments and supporting evidence on the Council files the Board is of the view that the following was not to the building consent: the roof cladding, the wastewater for sewage piping under the slab, the ground clearance of the cladding, the windows and eave details.

[73] It was claimed by the Respondent that some of these were discussed and approved on site by a Council inspector, but the Board saw no evidence of this on the council files nor was any council witness called to give evidence by the Respondent. Further, in the Board's view, the roof cladding and drainage change should have been covered by an amendment to the building consent and work on those parts of the build should have been stopped until the amendment was issued.

[74] The comment was made that this informal approach to handling amendments on site was "the West Coast way". The Board does not accept this. There is an obligation on a licensed building practitioner to ensure the correct processes are used ad and sign offs are obtained.

Record of Work

[75] 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[17].

[76] 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.

[77] The Board discussed issues with regard to records of work in its decision C2-01170[18] and gave guidelines to the profession as to who must provide a record of work, what

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

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.

[78] 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.

[79] 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 …".

[80] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Completion occurred in April 2018. A record of work has not been provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[81] 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.

[82] In this instance there was an ongoing payment dispute. 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.

[83] The Respondent has also noted that he had not realised the Complainant had been requesting the record of work. The requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations. In this respect the Counsel for the Respondent's submissions are not accepted.

Penalty, Costs and Publication

[84] 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

[85] 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*[19] 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.*

[86] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[20] 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.

[87] Based on the above the Board's starting point for penalty was $6500 given the number of issues discussed above and a general disregard for the consenting process. At the hearing the Respondent did accept that he had made some errors of workmanship and as such the Board has reduced the penalty to be paid to $4500.

[88] Costs

[89] 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."

[90] 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[21].

[91] In *Collie v Nursing Council of New Zealand*[22] 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.*

[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[20] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[21] *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.
[22] [2001] NZAR 74

[92] Based on the above the Board's costs order is that the Respondent is to pay the sum of $2,500 toward the costs of and incidental to the Board's inquiry.

Publication

[93] 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[23]. 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.*

[94] 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.

[95] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[24]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[25]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[26]. 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*[27].

[96] 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[28]. 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.

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

Section 318 Order

[98] 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 $4,500.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

[23] Refer sections 298, 299 and 301 of the Act
[24] Section 14 of the Act
[25] Refer sections 200 and 202 of the Criminal Procedure Act
[26] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[27] ibid
[28] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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.

[99] 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.

Submissions on Penalty, Costs and Publication

[100] 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 2019**. 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.

[101] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 25th day of June 2019

Chris Preston
Presiding Member

[i] ***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.