

Before the Building Practitioners Board

	BPB Complaint No. CB25618
Licensed Building Practitioner:	John Hancock (the Respondent)
Licence Number:	BP 116120
Licence(s) Held:	Carpentry and Site AoP 1

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	Whangarei
Hearing Type:	In Person
Hearing Date:	14 April 2021
Decision Date:	19 April 2021

Board Members Present:

Mr M Orange, Deputy Chair, Legal Member (Presiding)
Mr R Dunlop, Retired Professional Engineer
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1

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 disciplinary offences under sections 317(1)(b) and 317(1)(da)(ii) of the Act.

Contents

Summary of the Board’s Decision	2
The Charges	2
Function of Disciplinary Action	3
Inquiry Process	4
Evidence	4
The scope of the Respondent’s work.....	5
Foundations and cladding junctions	7
Change of cladding and cladding flashings	8
Record of work.....	9
Board’s Conclusion and Reasoning	10
Negligence and/or Incompetence	10
Record of Work.....	16
Penalty, Costs and Publication	18
Penalty	18
Costs.....	19
Publication	19
Section 318 Order	20
Submissions on Penalty, Costs and Publication	20
Right of Appeal	21

Summary of the Board’s Decision

- [1] The Respondent was negligent when he failed to ensure that the appropriate steps were taken when changes to the building consent were made. The Respondent has also failed to provide a record of work on completion of restricted building work. He is fined \$2,000 and ordered to pay costs of \$3,500.

The Charges

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ 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 contrary to section 317(1)(b) of the Act, IN THAT, the Respondent may have carried out or supervised the work identified

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

in a report completed by [Omitted] (page 262, document 2.5.110 of the Board's Documents) in a manner that does not meet acceptable standards; 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

Function of Disciplinary Action

- [3] 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.

- [4] 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."

- [5] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... 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.

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

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 *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

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

- [7] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

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

Evidence

- [10] 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.
- [11] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [12] The Respondent appeared and gave evidence. The Board, when it issued its decision to proceed to a hearing, summoned the following persons to appear and give evidence:

[Omitted]	Licensed Building Practitioner (BP[Omitted]) [Omitted]
Kenneth Dugdale	Forex Technical Analyst Systems Limited trading as Cavern Home Solutions

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

[13] The Respondent and the Complainant⁷ requested that the Board summon additional persons to give evidence. They were:

Paul Lee	Cavern Homes General Manager
Greg Bellam	Building Services Team Leader, Kaipara District Council
[Omitted]	[Omitted], the Homeowner, “the Trustee”
Jamie Nikouira	Kaipara District Council

[14] The Respondent and the Complainant both appeared with additional persons. They indicated that those in attendance were available to give evidence.

[15] At the commencement of the hearing, the Presiding Member outlined the Board’s limited jurisdiction, the regulated complaints process and the allegations that the Board would be further investigating at the hearing (as outlined in paragraph [2] above). The reason for outlining those matters was that following the Complaint being made and the Board making its decision on the grounds for discipline and in the lead up to the hearing, the Board received significant amounts of new materials, including additional allegations of negligent or incompetent building work. It was made clear that the Board could not, at the hearing, investigate those new allegations as, to do so would have been a breach of natural justice as the Respondent had not, given the time frames, been afforded the opportunity to consider and respond to those allegations. It was also made clear that further complaints could be made in respect of new allegations.

The scope of the Respondent’s work

[16] The build was an alteration to an existing dwelling carried out under a building consent. The building contract was between Forex Technical Analyst Systems Limited, trading as Cavern Home Solutions and [Omitted]. The full scope of the consented building was not completed by Forex as a result of a commercial dispute that arose. The contract came to an end on or about 25 September 2020, when the contract was suspended. There is an ongoing dispute between the contractual parties.

[17] The Respondent did not carry out any building work. He was the designated supervisor of restricted building work, which is a subset of building work that must be carried out or supervised by a licensed building practitioner. The building contract identified the Respondent together with Paul Lee as the persons who would be carrying out the Works (as defined in the contract) and the Respondent as “the person supervising the Works”. A site notice erected at the dwelling stipulated the same. Mr Dugdale, a director and shareholder of Forex gave evidence that the Respondent had been an employee for seven years as his construction supervisor.

⁷ The Complainant was the son of the Trustee. He was a Licensed Building Practitioner. He made the complaint on behalf of the Trustee.

Mr Dugdale stated the Respondent retired when the Covid lockdowns occurred but that the Respondent had subsequently worked as a contractor who was paid on an hourly basis to supervise restricted building work. Mr Dugdale gave evidence that the documentation and signs had not been updated to reflect the change in the Respondent's status. Mr Paul Lee was noted as being the current construction supervisor. Mr Lee is not a Licensed Building Practitioner. An email dated 7 September 2020 from Mr Dugdale to the Trustee summarised the arrangements as follows:

In reply to your email and requested meeting

I would like to inform you that John Hancock is an independent contractor and retired from full time work Jan 2020

We utilise his services on a as required basis to provide LBP sign off of construction carpentry for our Manawhai projects and sign off from council. He provides this service to others locally

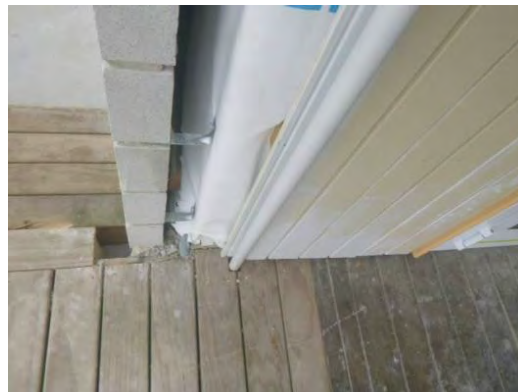
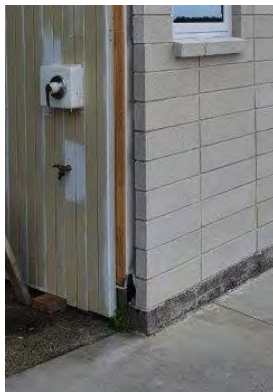
- [18] The on-site building work was carried out by a lead hand who had approximately 30 years of building experience in both commercial and residential building (including renovations), together with two apprentices. The lead hand was a contractor to Forex. The lead hand was not a licensed building practitioner. As such, he had to be supervised when carrying out restricted building work elements (structural and weathertightness). The Respondent had approximately three years of working experience with the lead hand. He had worked with and supervised four homes with the lead hand. The Respondent described the lead hand as a good worker.
- [19] The Respondent supervised the following restricted building work, as identified in his record of work dated 25 September 2020:
- Primary Structure: foundations, walls, roof, beams
- External Moisture Management Systems: wall cladding or wall cladding system.
- [20] The Respondent confirmed, at the hearing, that the work described in the record of work was the restricted building work that he had supervised. It was noted that he had not supervised roofing moisture management systems. As such, the Board did not further investigate that element of the [Omitted] report.
- [21] The Respondent described his supervision process. He stated that he walks on site, asks where the work is at, does some checks and issues some instructions. The Respondent stated that sometimes he does not need to go onto the site but can check work by engaging with Mr Lee at the entrance (described as "discussions at the gate") or by phone. The Respondent stated that he does not get involved until such time as the work is underway but that there may be "some discussions" before work commences. He did not review the consented plans and specifications with the builders prior to them starting. He charged \$75 per hour for his services. Council inspections were called for by Mr Lee. The Respondent stated that he checks the

work prior to an inspection and that he attends inspections. He was, according to Council inspection records, present at an inspection on 25 May 2020.

- [22] There was some dispute as to how often the Respondent was on site. The Trustee, who lived on-site but was away in Auckland some of the week but whose wife was on-site all week, stated that the Respondent was only on-site once or twice. The Trustee stated that when he became concerned about accumulated building issues, he contacted the Respondent and asked him to come to the site. The Trustee said that the Respondent refused and that he would only attend if he was paid his hourly rate. The Trustee referred to an email that stated the same. The Respondent stated that he was busy at home when the request was made and that he did not want to get involved as he was aware that a dispute was developing. Mr Dugdale stated there was no restriction on how much time the Respondent could spend on supervision services. The Respondent maintained that he had been to the site regularly but was not able to state how often and that he had been in regular contact with Mr Lee. The Respondent, in a written submission to the Board, referred to the Supervision Practice Note issued by the Ministry of Business Innovation and Employment and to the level of supervision required for experienced staff.

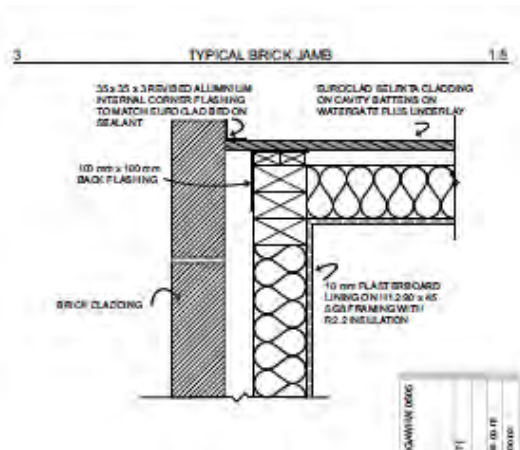
Foundations and cladding junctions

- [23] The [Omitted] report noted, "The foundation and the brick stop on the building line is at least 80mm short of the distance required". This, in turn, related to an external brick to weatherboard junction. The allegation was that the foundation was not constructed in a manner that would allow the junction to be completed in accordance with the construction details stipulated in the building consent. Brick to weatherboard junctions are shown in the following photographs.



- [24] The Respondent and Mr Lee stated that an alternative solution to that outlined in the building consent would have been used had the building work continued. Mr Lee stated that a minor variation had been prepared for the change but that the Trustee refused to sign it. The solution to be used was one that had previously been accepted on a different job.

[25] The consented details was as per the following:



[26] It was noted that the brickwork did not extend past the building line as specified in the building consent. It was some 40mm short of where it should have extended to.

[27] Mr Bellam confirmed that, from a Building Consent Authority (BCA) perspective, the change would have been a minor variation as opposed to an amendment to the building consent. Mr Bellam noted that if changes are to be made by way of a minor variation that the process is to discuss the change with the BCA prior to making the change as opposed to seeking a minor variation after the fact.

[28] The Respondent, Mr Lee and Mr Dugdale maintained that the building work complained about was not complete.

Change of cladding and cladding flashings

[29] The [Omitted] report noted:

A couple of areas which illustrate a lack of understanding of the building act, the code, and how it applies to restricted building work was the decision by the site supervisor Paul Lee, to depart from the consented plan and introduce a flashing system without the required skills or LBP design qualifications required, and without the amended drawings, detail, and approved variation to the consent, necessary to ensure compliance with all aspects of the code, particularly in regard to E2/AS1 dealing with external moisture control,

[30] The following photographs depict the issue he was referring to:



- [31] The cladding was, by agreement, changed from brick to brick and weatherboard. The consent issued was full-length brick in the related areas as shown in the stamped plans:



- [32] Mr Bellam considered the change could have been dealt with as a minor variation but again stated that the change should have been checked with the BCA prior to any work being undertaken.
- [33] The Respondent and Mr Lee stated that the flashing installed was a standard E2/AS1 detail. [Omitted] considered it needed specific design, especially areas such as stop ends. The Respondent considered the change and the method to waterproof as simple and that all that was needed was an over-flashing. There was also evidence from Mr Dugdale that the flashing was temporary to provide weatherproofing when a suspension of the contract was imminent.
- [34] The Respondent, Mr Lee and Mr Dugdale maintained that the building work complained about was not complete.

Record of work

- [35] The building work, including the restricted building work, came to an end when the contract was suspended on or about 25 September 2020. The Respondent's record of work was dated as at 25 September 2020.
- [36] The Complainant alleged, as part of the complaint, that a record of work had not been provided to the owner.
- [37] The Board received a copy of the record of work from Mr Dugdale as part of correspondence he sent to the Board dated 23 March 2021.
- [38] The Respondent stated that he handed his record of work to Mr Lee. He was not aware that he was required to provide it to the owner and the Territorial Authority.
- [39] Mr Bellam confirmed, post the hearing, that the Territorial Authority had received the record of work on 23 March 2021.

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 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.

Negligence and/or Incompetence

[41] The finding of negligence relates to the Respondent's failure to ensure changes to the building consent were dealt with in the appropriate manner. The Respondent was not the lead contractor, nor the on-site builder or contract supervisor. He was the designated Licensed Building Practitioner, and he accepted responsibility for the quality and compliance of the restricted building work. It was his job to supervise those who were on site. That included ensuring the consenting processes were followed during the build. The Board's finding was that they were not when it came to changes that were made to brick to weatherboard junctions and when a cladding change from brick to weatherboard was made.

[42] 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*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.

[43] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹⁰. 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.

[44] 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 Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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 practitioner¹².

[45] 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.*

[46] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[47] 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.

[48] Looking at the conduct in question, 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:

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

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.*

[49] 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.

[50] 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.*

[51] Section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably, it states:

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.*

[52] Minor variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a minor variation as:

3 Minor variation defined

- (1) *A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*
- (2) *The following are examples of minor variations and do not constitute an exhaustive list:*
 - (a) *substituting comparable products (for example, substituting one internal lining for a similar internal lining):*
 - (b) *minor wall bracing changes:*
 - (c) *a minor construction change (for example, changing the framing method used around a window):*
 - (d) *changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*
- (3) *The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

[53] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a building consent, there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still apply. Most importantly, the building consent authority retains the discretion to refuse a minor variation¹⁶. To aid the process of applying for a minor variation, most building consent authorities have a minor variation application form.

[54] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than proceed the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought¹⁷.

¹⁶ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

¹⁷ Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

[55] It must also be noted, as regards a licensed building practitioners' obligations, that section 89 of the Act places a positive burden on a licensed building practitioner to notify a building consent authority of a breach of a building consent:

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.*

[56] In *Tan v Auckland Council*¹⁸ 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 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.

[57] The same applies to the ongoing verification of building work against the requirements of the building consent. A failure to notify the Council of changes to the consented documents prior to them being carried out defeats the purpose of the process.

[58] Mr Bellam indicated that the two changes that had been made might have met the minor variation definition. The key point, however, is that the BCA should have been consulted in advance of the changes to ensure that they would actually be minor variations and that they would still meet building code compliance requirements. That did not occur.

[59] Given the above, the Respondent had a duty, if the building work could not be carried out 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

¹⁸ [2015] NZHC 3299 [18 December 2015]

meet building code compliance requirements prior to the associated work being carried out. That did not occur. Rather the changes were proceeded without ensuring that the changes were approved and would meet the requirements of the building code. In doing so, the Respondent has departed from what the Board considers to be an accepted standard of conduct and thereby has been negligent.

[60] The Board also considers that the Respondent has not been carrying out his duties as a supervisor of the restricted building work to the full requirements of the licensing regime.

[61] Supervise is defined in section 7¹⁹ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

[62] In C2-01143 the Board also discussed the levels of supervision it considers would be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[63] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[64] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992²⁰. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the Court are instructive. In the case, Judge Tompkins stated at paragraph 24:

¹⁹ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

²⁰ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

- [65] The Respondent referred to the Ministry of Business Innovation and Employment’s Supervision Practice Note. It contains a risk matrix to establish the correct type of supervision. The Respondent submitted, given his knowledge of the workers involved, that remote supervision was appropriate. Remote supervision still requires engagement and involvement in the building work. There needs to be knowledge of what is being done and regular checks to ensure it is compliant. The Board does not consider that this was occurring. Rather the Respondent was taking a hands-off, rather than remote, supervision approach. This is demonstrated by his lack of knowledge of the changes that were being made and his failure to intervene.

Record of Work

- [66] 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 work²¹.
- [67] 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.
- [68] The Board discussed issues with regard to records of work in its decision C2-01170²² 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.
- [69] 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.
- [70] 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

²¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²² *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*²³ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

- [71] As to when completion will have occurred is a question of fact in each case. In most situations’ issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. That did not occur in the present case. The work came to a premature end on 25 September 2020 when the building work was suspended. In effect, that was the completion date.
- [72] The Respondent gave evidence that he gave the record of work to Mr Lee. It was not passed on to the required recipients. 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 a 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.
- [73] The record of work was provided to the Territorial Authority on 23 March 2021, just prior to the hearing. A complaint was made about its non-provision in September 2020. Notwithstanding the complaint, no steps were taken to provide it.
- [74] On the basis of the above, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [75] 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. There were no good reasons.
- [76] Finally, the Respondent should 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. The Respondent has submitted that he was not aware of this. He should note, however, that apart from being a clear statutory requirement, there have been multiple newsletter articles and other publications that have been sent to Licensed Building Practitioners advising them of their obligations.

²³ [2018] NZHC 1662 at para 50

Penalty, Costs and Publication

- [77] 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.
- [78] 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

- [79] 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*²⁴ 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.

- [80] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁵ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [81] The Board has made two disciplinary findings, negligence and a failure to provide a record of work. Record of work matters are at the lower end of the disciplinary scale. The Board’s normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour.
- [82] An additional penalty for the finding of negligence is required. The Board considers an additional fine of \$1,500 is appropriate. This amount is consistent with other fines imposed by the Board for similar offending.
- [83] The total fine is set at \$3,000. The Board does note that there are mitigating factors. The Respondent was caught in a commercial dispute that was not of his doing. The Board has decided to reduce the fine to \$2,000 to recognise that mitigating factor.

²⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [84] 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.”
- [85] 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 case²⁶.
- [86] In *Collie v Nursing Council of New Zealand*²⁷ 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.*
- [87] The matter was dealt with at a hearing. Significant costs have been incurred. Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board’s inquiry. This is the Board’s standard scale of costs for a half-day hearing. It is significantly less than 50% of the actual costs that have been incurred.
- [88] Given the involvement of the main contractor in the events that lead to the hearing and the limited role in the build of the Respondent, the Board hopes that the main contractor will assist with the payment of the costs imposed.

Publication

- [89] 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 Act²⁸. 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.*
- [90] 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.

²⁶ *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.

²⁷ [2001] NZAR 74

²⁸ Refer sections 298, 299 and 301 of the Act

- [91] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³¹. 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*³².
- [92] 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 interest³³. 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.
- [93] Based on the above, the Board will not order further publication.

Section 318 Order

- [94] 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 \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (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(I)(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.

- [95] 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

- [96] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 9 June 2021. 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

²⁹ Section 14 of the Act

³⁰ Refer sections 200 and 202 of the Criminal Procedure Act

³¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³² *ibid*

³³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

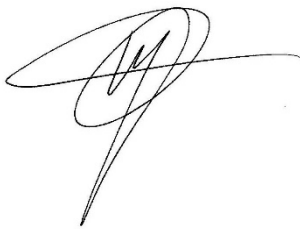
those submissions prior to coming to a final decision on penalty, costs and publication.

- [97] 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/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 18th day of May 2021



Mr M Orange
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.*