Before the Building Practitioners Board

	BPB Complaint No. CB25331
Licensed Building Practitioner:	Christopher Haskell (the Respondent)
Licence Number:	BP 123446
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	Wellington
Hearing Type:	In Person
Hearing Date:	25 February 2020
Decision Date:	14 April 2020

Board Members Present:

Mel Orange, Legal Member (Presiding)
Richard Merrifield, LBP, Carpentry and Site AOP 2
Bob Monteith, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Appearances:

M Freemen, Barrister and Solicitor, for the Respondent

K Sullivan, Barrister, for the Complainant

Procedure:

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

Board Decision:

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

Contents

Introduction

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

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT:

- building set out was not as per the building consent;
- foundations and structural masonry were noncompliant;
- framing was not correctly fixed;
- failure to obtain inspections; and

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

- failure to correctly deal with changes to the building consent;

(b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise contrary to section 317(1)(c) of the Act, IN THAT, he may have carried out or supervised work that required a Brick and Blocklaying licence;

(c) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT:

- building set out was not as per the building consent;
- foundations and structural masonry were noncompliant;
- framing was not correctly fixed;
- failure to obtain inspections; and
- failure to correctly deal with changes to the building consent;

(d) 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, IN THAT, a record of work was not provided within a reasonable period of time of completion of restricted building work; and

(e) breached section 314B(b) of the Act in that he may have carried out or supervised building work that is outside of his competence by undertaking blocklaying work.

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].

[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

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

> *… 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.*

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

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

Inquiry Process

[7] 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.

[8] 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.

[4] [2016] HZHC 2276 at para 164
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Evidence

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[10] 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.

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

Christopher Haskell	Respondent
[Omitted]	Complainant
[Omitted]	Witness, Engineer
[Omitted]	Witness, Licensed Building Practitioner, Blocklayer
[Omitted]	Witness for the Complainant, quantity surveyor and project manager

[12] The Respondent was engaged to carry out building work on a new residential dwelling under a building consent. The building work included restricted building work. The Respondent's building work started in late May 2018 and came to an end in early 2019 with work ceasing on or about 22 February 2019 and the contract to build being brought to an end on or about 18 April 2019. The build was only partially complete. A record of work dated 4 June 2019 was provided as part of the investigation into the complaint on 3 October 2019. A commercial dispute has followed.

[13] The complaint raised various allegations which reflect the charges noted in paragraph [1] and evidence was received in respect of each and in the following order:

- sections 317(1)(c) and 317(1)(h) in relation whether the Respondent carried out or supervised restricted building work that he was not licensed to carry out or supervise or whether he worked outside of his competence;
- sections 317(1)(b) and 317(1)(d) in relation to quality and compliance of the building work; and
- section 317(1)(da)(ii) in relation to the provision of a record of work.

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

Licensing and Competence

[14] The issues before the Board was whether the Respondent, who holds a Carpentry Licence, had carried out or supervised blockwork.

[15] *[Omitted]* who has held a Bricklaying and Blocklaying Licence with an Area of Practice of Structural Masonry Veneer since 14 December 2011 gave evidence by telephone conference. He stated that he was the supervising licensed person for the blockwork. He had a limited on-site role due to health issues. His staff carried out the work in lifts of approximately 1.6 metres each time. Some assistance was provided by the Respondent's staff with the placement and tying of steel. The Respondent stated he would call in at the start and finish of each day to check the work.

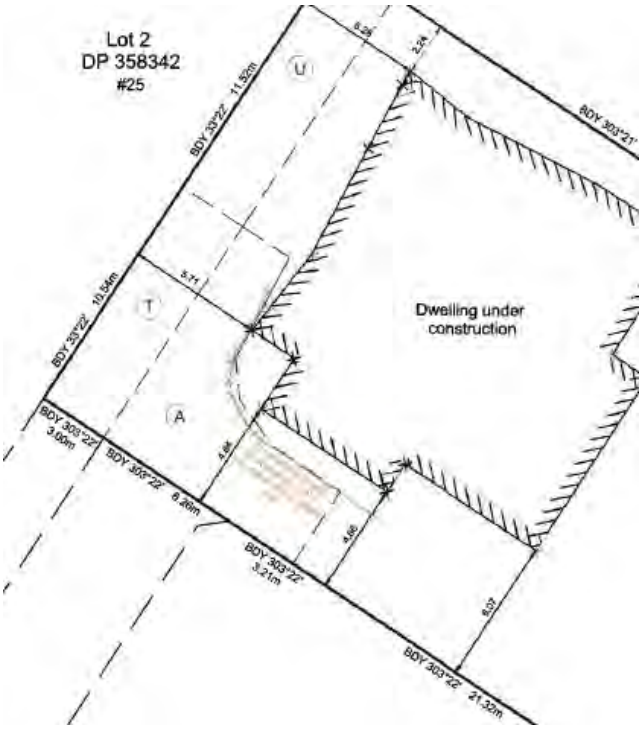
Negligence/Incompetence and Contrary to a Building Consent

[16] The issues the Board resolved to further investigate were set out in its regulation 10 decision of 18 December 2019. Not all of the issues raised by the Complainant were further investigated as the Board did not consider that they met the threshold for disciplinary action.

Building Set Out

[17] The allegation was that the building set out was not in accordance with the building consent. The Respondent set the building out on the site by identifying three boundary pegs and one pin set in concrete. He did not use a surveyor.

[18] A survey carried out on 10 May 2019, after the foundations and retaining walls had been constructed, identified a set out error. A retaining wall was identified as encroaching by 375mm into a turnaround area. The error is shown on the following extract from the As-built Survey Plan developed on 10 May 2019.



[19] The Respondent accepted an error had been made. He stated that he had followed the Site Plan (sheet 1 of 33) but accepted that in setting the retaining wall out he had followed the existing curb line shown on the Site Plan, not the line of the retaining wall as shown on the Site Plan.

Foundations and Structural Masonry

[20] The Board was provided with extensive evidence in relation to alleged issues with the blockwork. Included was a report from *[Omitted]* of *[Omitted]* who was the structural design and construction supervision engineer to the project. He raised issues with the quality and compliance of the blockwork and vertical deflection of the blockwork which was outside of allowable tolerances. *[Omitted]* identified a failure to prop the blockwork during construction and the use of an incorrect backfill as the most likely reasons for the deflection. He noted that the structural implication of the deflection is that the associated walls had been effectively prestressed which results in a reduction of the available movement capacity.

[21] With regard to the issues were raised with the block laying the Respondent did not carry out or supervise the laying. *[Omitted]* did. Every licensed building practitioner is responsible for their own restricted building work (the blockwork was structural and was therefore restricted building work).

[22] In terms of deflection there was a requirement for the blockwork to be propped whilst it was constructed and when it was backfilled. The Respondent was responsible for those aspects of the build.

[23] Propping was not installed as the blockwork went through its lifts nor when it was backfilled. The Respondent stated that he discussed this on site with *[Omitted]*. One site note was referenced from 5 November 2018 which stated:

> *Engineer approved partial and early backfill of lower portion of wall without propping to allow construction of footing for Section BB' top wall. Full curing time and propping not required as load is minimal.*

[24] There were no other site notes from *[Omitted]* to this effect. *[Omitted]* did not accept that he had given authorisation for propping not to be used beyond that noted above. The Respondent maintained they were verbal instructions. *[Omitted]* noted that he had observed a lack of propping on one site visit but did not raise it.

[25] The building consent specified that compacted backfill was to be installed. The engineering specification provided:

> *Imported backfill material directly behind retaining wall to be free draining hardfill to TNZ F/2 specification and compacted lightly in 100mm layers with a plate compactor after infill grout has cured.*

[26] The Respondent installed 8mm grit which he considered was a self-compacting fill. *[Omitted]* stated, on the basis of his knowledge, there are no backfills that are self-compacting. He noted that a chip product would have been acceptable as a free

draining material prior to compacted fill being installed. The Respondent stated that he used pea metal as the drainage material. Compacted fill was not installed behind the walls but 200-400mm of plate compacted AP40 was installed by a contractor under the slab.

[27] *[Omitted]* noted in a letter dated 21 February 2020 that the fill failed a penetrometer test. It was noted that the penetrometer sunk in the fill under its own weight. *[Omitted]* stated that further investigations, including invasive investigations, were being carried to ascertain the suitability of the backfill.

[28] It was also alleged that Respondent did not allow sufficient curing time for concrete fill in the blocks prior to backfilling and that this may have also contributed to deflection. The pour occurred on 7 November 2018. Backfill occurred on 30 November 2018.

Framing not Correctly Fixed

[29] The Respondent stated that the framing connections were not complete when he ceased work on the site. Work had not progressed beyond the point where the connections could be made.

[30] It was noted that there was a change to the design of the mid-floor trusses. The evidence, however, was that the changes related more to the manufacturing programme used by the truss manufacturer than to the actual design of the truss.

Failure to Obtain Inspections

[31] The Respondent accepted that not all of the required engineering inspections were called for. In particular the 1.5 floor masonry wall first lift pre-pour, the 1st floor to 1.5 floor masonry wall first lift pre-pour and the ground floor to 1st floor masonry wall second lift pre-pour.

[32] *[Omitted]* stated that invasive testing was now being completed to assess the compliance of the work related to the missed inspections.

[33] *[Omitted*] was referred to a written statement he prepared for an adjudication. It referred to the 1.5 floor masonry wall first lift pre-pour and to photographs provided by the Respondent prior to the pour. *[Omitted]* stated the photographs afforded a limited view and that he would have liked the opportunity to view the work.

Failure to Correctly Deal with Changes to the Building Consent

[34] The Board heard evidence that changes to the building consent were made during the build, but that *[Omitted]* was consulted and provided instructions with regard to the changes. *[Omitted]* was working under the supervision of a Chartered Engineer. A Chartered Engineer is treated as if they were licensed with a Design Area of Practice 3 and Site Area of Practice 3 licence.

Supervision

[35] The Respondent, at the time of the build, had six staff working for him and two builds underway. He was the only licensed building practitioner. He was not actively carrying out building work on the site. He was supervising. The staff on site were experienced. He stated he would visit the site anywhere from daily or every second day but at times there may have been a gap of up to four days between visits. He stated he would make visual checks of the work when on site and that he would also catch up with staff by phone, facetime and email. He would, at times, take the staff through the plans and build methodology.

[36] The Respondent was questioned as regards his experience with complex builds on a hill. He stated that this was his third or fourth build on a hill and that this was the most complicated build he had carried out.

Record of Work

[37] The Respondent sent a letter to the building consent authority (BCA) on 26 April 2019 stating that he was no longer the licensed building practitioner for the build. At the hearing he stated that he thought he attached a record of work to the letter. The copy of the letter in evidence came from the BCA. It included an Advice Form. It did not include a record of work.

[38] Documentation relating to the build was provided on 6 May 2019 but again a record of work was not included.

[39] A record of work dated 4 June 2019 was provided to the Board by the Respondent as part of its investigations. It was dated after the letter to the BCA.

[40] It was submitted that the record of work had not been asked for, was not deliberately withheld and the delay was not inordinate.

Post Hearing Submissions

[41] The Respondent was given leave to provide further engineering evidence in response to that provided by *[Omitted]* within 10 working days of the hearing. An opinion from *[Omitted]* a Chartered Professional Engineer was provided. It dealt with deviations of concrete block walls and concluded that there was only one instance of deviation that fell outside of the allowable tolerances in NZS 4210.

Board's Conclusion and Reasoning

[42] 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);

(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.

[43] The Board has also decided that the Respondent **has not**:

(a) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); or

(b) breached section 314B of the Act (s 317(1)(h) of the Act).

[44] The Board made the decision that neither section 317(1)(c) or (h) had been breached on the basis that a licensed building practitioner with a Bricklaying and Blocklaying Licence had supervised the concrete block laying.

[45] The Board has also decided that the Respondent **has not** carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[46] The Board's decision in respect of section 317(1)(d) was on the basis that consent changes were being overseen by an engineer and that other aspects of noncompliance have been dealt with in the finding of negligence.

[47] The reasons for the Board's decisions on the grounds of discipline that have been upheld are as follows.

Negligence and/or Incompetence

[48] The finding of negligence relates to the Respondent's supervision of non-licensed persons.

[49] 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].

[50] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[9]. 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.

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

[51] 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[10]. 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[11].

[52] 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.*

[53] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[12] and be carried out in accordance with a building consent[13]. 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.

[54] Looking at the Building work the Board decided that the allegations relating to the quality of the block work were not matters that related to the Respondent as the work was carried out by another licensed building practitioner. The Board also accepted that the framing connections related to incomplete work rather than noncompliant work.

[55] The Board did receive and hear evidence of other matters that did not meet acceptable standards. These were incorrect set out, failure to prop blockwork during construction, the use of incorrect backfill and the failure to call for required

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

engineering inspections. It found that those failings arose from a failure by the Respondent to adequately supervise the building work.

[56] Supervise is defined in section 7[14] 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.*

[57] In C2-01143 the Board also discussed the levels of supervision it considers will 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.

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

[59] 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 1992[15]. 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:

> *"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*

[14] 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.

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

> *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."*

[60] The Respondent stated he was on site most days and that he would review the work when he was on site. Notwithstanding this he failed to identify and deal with the issues noted. The Respondent also gave evidence that it was the most complex build he had undertaken. Notwithstanding this he was not on site on a full-time basis and was not closely supervising the build. The Respondent made decisions that could have long term implications for the build. It is in this respect that the Board finds that the Respondent's conduct has fallen below an acceptable standard. The Board finds that a reasonable licensed building practitioner would have provided a greater degree of supervision and that there would have been closer attention to the specific requirements of the build and the building consent documentation.

[61] Turning to seriousness in *Collie v Nursing Council of New Zealand*[16] 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.*

[62] Seriousness does not relate to the consequences of the failings but the extent of the practitioner's departure from acceptable standards. As noted above the behaviour needs to fall seriously short. In this instance the Board finds that it was not mere inadvertence. Conscious decisions were made without forethought to the long-term repercussions of those decisions, especially with regard to propping of block walls and their backfill.

[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.

Record of Work

[64] 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.

[65] The Board discussed issues with regard to records of work in its decision C2-01170[17] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be

[16] [2001] NZAR 74
[17] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[66] 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.

[67] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*[18] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

[68] As to when completion will have occurred is a question of fact in each case.

[69] 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, at the latest on 26 April 2019 when the Respondent notified the BCA that he was no longer the licensed building practitioner. Completion is considered to have occurred at that point as he would not be carrying out any further restricted building work after that point in time. A record of work was not provided until 3 October 2019 and then only after a complaint had been made to the Board in August 2019. 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.

[70] 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.

[71] In this instance there was an ongoing dispute. Whilst it was stated that the record of work was not deliberately withheld the Respondent should note 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.

[72] The Respondent also submitted that he was not asked for a record of work. He 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

[18] [2018] NZHC 1662 at para 50

required to act of his own accord and not wait for others to remind him of his obligations.

Penalty, Costs and Publication

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

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

Penalty

[75] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[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.*

[76] 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 do 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.

[77] The Board noted that the findings under section 317(1)(b) of the Act related to supervision and a lack of process and understanding of the role of a supervisor. Given this the Board considers that training in supervision would benefit the Respondent.

[78] The training to be undertaken is the BCITO Advanced Trade Supervisory Skills Package. It is to be completed to the satisfaction of the Registrar and evidence of successful completion is to be provided to the Registrar as part of satisfying this requirement. The training is to be completed at the Respondent's own cost.

[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[20] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[79] In respect of the record of work matter whilst the Board would normally impose a fine it considers, given the training order, that a censure will suffice. A censure is a formal expression of disapproval.

Costs

[80] 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."

[81] 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].

[82] 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.*

[83] 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.

Publication

[84] 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.*

[85] 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.

[86] 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

[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
[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

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].

[87] 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.

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

Section 318 Order

[89] For the reasons set out above, the Board directs that:

Penalty:	**In respect of the disciplinary offending under section 317(1)(b) of the Act the Respondent's licence, pursuant to section 318(1)(c) of the Act, is restricted from supervising restricted building work until such time as he completes training under section 317(1)(e) of the Act is the BCITO Advanced Trade Supervisory Skills Package to the satisfaction of the Registrar; and** **In respect of the disciplinary offending under section 317(1)(da)(ii) of the Act the Respondent, pursuant to section 318(1)(d) of the Act is censured.**
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(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.**

[90] 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.

[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

Submissions on Penalty, Costs and Publication

[91] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **8 June 2020**. 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.

[92] 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

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

Signed and dated this 15th day of May 2020

M. J. Orange
Presiding Member

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[i] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may

- *(a) do both of the following things:*
  - *(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
  - *(ii) order that the person may not apply to be relicensed before the expiry of a specified period:*
- *(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
- *(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
- *(d) order that the person be censured:*
- *(e) order that the person undertake training specified in the order:*
- *(f) order that the person pay a fine not exceeding $10,000.*

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."

[ii] ***Section 330 Right of appeal***

(2) A person may appeal to a District Court against any decision of the Board—

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.