Before the Building Practitioners Board

	BPB Complaint No. CB25707
Licensed Building Practitioner:	Craig Hayes (the Respondent)
Licence Number:	BP 129104
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	Dunedin
Hearing Type:	In Person
Hearing Date:	1 March 2022
Decision Date:	10 March 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, LBP, Carpentry and Site AOP 2

Appearances:

Ms S Curlett and Ms H MacKenzie for the Respondent

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 Findings:

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

The Respondent **has not** committed a disciplinary offence under section 317(1)(h) of the Act.

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Summary of the Board's Decision

[1] The Respondent has carried out or supervised building work in a negligent manner and has 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 disciplinary outcome will be recorded on the Register of Licensed Building Practitioners for a period of three years.

[2] The Board found that the Respondent did not breach section 314 (B) (b) of the Act in that the allegation that he carried out design work in relation to on-site solutions developed and implemented was not proven on a balance of probabilities.

The Charges

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

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);

(b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section

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

88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and/or

(c) breached section 314B of the Act (s 317(1)(h) of the Act), in that he may have carried out design work in relation to on-site solutions developed and implemented.

[4] In respect of negligence or incompetence, the Board resolved to investigate the issues raised by the Complainant in a document dated 21 January 2021 (Document 2.2.18, Page 29 of the Board's file) and the matters noted in a building consent authority inspection record dated 13 November 2020 including the photographs attached (Document 3, Pages 83 – 89 of the Board's file.).

Function of Disciplinary Action

[5] 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].

[6] 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."*

[7] 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."*

[8] 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

[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

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.

[9] The above commentary on the limitations of the disciplinary process is 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

[10] 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.

[11] 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 proceeding.

Evidence

[12] 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 that allow it to receive evidence that may not be admissible in a court of law.

[13] 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.

[14] In addition to the documentary evidence before the Board, it heard evidence at the hearing from the Respondent (Craig Hayes) and the Complainant ([Omitted]).

[15] Prior to the hearing, Counsel for the Respondent provided detailed written submissions which also contained a significant amount of factual evidence. At the commencement of the hearing the Respondent and his Counsel agreed to take the submissions as read. Further, the Respondent agreed that the factual matters in the submissions were to be taken as his evidence and that they fairly reflected the sequence of events.

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

[16] The Respondent was engaged to carry out the new timber piled foundations and structural fixing to the new foundation for a dwelling that had been transported to site from Mosgiel. When the Respondent commenced work, the house was in place (temporarily propped in its intended location). The Respondent needed to construct the sub-floor and lower the house onto it. He began work on 15 September 2020, and his last day on-site was, due to the relationship breakdown, shortly after a Council inspection on 13 November 2020.

[17] The Complainant, on 20 January 2021, viewed the work for a friend who was considering tendering for the completion of the job after the Respondent's departure from the project. The Complainant, who is a structural and civil engineer, said there was a *"quantum of work which I believe not up to standard "*and *"the standard of work was such that I should lodge a complaint."*

[18] The Complainant acknowledged that he had not seen the Council Inspection Report of 13 November 2020, and he agreed that when he viewed the project, the work was not complete.

[19] The Respondent made the point that it was difficult for him to respond to the matters the Complainant raised as he had not been back to the site to view the work and was unsure if and what work may have been done after his departure. By contrast, he was able to address the matters raised in the Council inspection of 13 November 2020 because he was on-site then.

[20] The Respondent stated that the work was carried out by himself and a contractor (who was a qualified carpenter, but not a Licensed Building Practitioner) and staff supplied by [Omitted] (a Licensed Building Practitioner), being one or two apprentices. The Respondent gave evidence that he was on-site *"pretty much all the time…when my contractor was there, I was there*."

[21] The Respondent advised that he had done a few relocations but never on a sloping site like this one. He added that he had not really piled foundations on a hillside and said this was the "*first of this magnitude in sense of slope of ground."*

[22] In terms of the issues being investigated, turning firstly to those noted by the Complainant (Document 2.2.18, Page 29 of the Board's file) the evidence was that:

(a) **House meant to be lower to the ground** – The Respondent stated that he did not understand what was meant by this and pointed to the November Council Inspection (Document 4.2, Page 175 of the Board's file), which recorded - *"Heights good"*. When questioned on the setting of the finished floor height, the Respondent said, "*some peg somewhere we were going off, would have to be something we went off to measure the 600min to go off…can't honestly remember where that was or how we found that point"*. The Complainant cleared up that he did not mean the finished floor height was too high – but rather the house was set too high based on anchor piles being above the height they can be at.

(b) **Some piles not vertical**. The Respondent believed there was scope for an out of vertical plumb tolerance of up to 15mm/1m length of pile, and that piles within such tolerance would still comply with the building code. He believed he would have ensured all were within 15mm of vertical plumb, but he was unable to return to site to confirm this. The Complainant disputed this and said the tolerance was for driven piles only – not for what the Respondent had done. In his written response and at the hearing, the Respondent stated that some of the piles that were not plumb could have the nails removed, be pulled over, and re-fixed. (Document 2.2, Page 37 of the Board's file).

(c) **Brace piles with brace greater than 45 degrees** –The Respondent accepted this and said it was a genuine mistake.

(d) **A bearer with poor alignment** – The Respondent, in his written submission, accepted this but believed that the bearer was still structurally sound. (Document 8.2.1.2, Page 301 of the Board's file).

(e) **Two parts of house not joined together** – The Complainant said a visible gap was not weathertight and was going to result in damage. He did, however, accept that the works were not complete. The Respondent acknowledged the two non-joined parts of the house but stated that the house was not complete. It was left this way because of the owner's instruction that the roof was the priority. He stated the flashing was on-site and ready to install and would have been installed if he had been able to complete the job.

(f) **Use of packers** –The Respondent used non-compressive packers and explained his process as "*just slide them in until touching, might tack up each side, til taking the load and can't slip*". The Respondent could not remember whether he checked if it was a load-bearing pile transferring load from the roof. (Document 2.1, Photograph page 31 of the Board's file). In his written submission, the Respondent said he used the jack and pack method and believed it to be best practice at the time. He stated it was the most cost-effective method but if he had been in a situation without financial constraints, he would have rebuilt the floor. The Respondent said, *"he has now learnt from this and will incorporate this in his practice going forward".* (Document 8.2.1.2, Page 303 of the Board's file).

(g) **Bent nail plate and pile which does not line up with the side of the bearer** – The Respondent accepted responsibility for this.

(h) **Rotten bearer** -The Complainant said the bearer looked rotten, but he did not know if he tested it with his key. The Respondent said this bearer is located under an internal gutter, and he believed it was water staining rather than rot - *"he would have assessed this bearer and did not consider it*

to be rotten, otherwise it would have been replaced". (Document 8.2.1.2, Page 302 of the Board's file).

(i) **Balcony supports left hanging in the air**- In his written response, the Respondent stated the supports were present under the balcony when he left site, and he referred to photographs provided. (Document 8.2.1.2, Pages 391 and 392). However, at the hearing, he could not recall if that was the case and agreed that the angle brace and timber props were put in by the house movers and, presumably, when the house movers lowered the house, they also lowered the timber props at the same time. The Respondent did not recall putting in replacement props. He maintained that the angle braces remained in place.

(j) **100x100 pile** – The Respondent was unable to confirm whether the pile was 100mm because he could go back on-site, although he believed it was 125 mm. If it was 100mm, he accepted this would have been an error because 125mm was specified. The Board noted a splay that reduced the size of the pile on the back of the pile where it met the bearer. The size of the bearer and the splay indicated that the pile may have been greater than 100mm. Under questioning from the Board, the Complainant agreed that it appeared the pile in his photograph was the correct size.

[23] Turning then to the matters raised in the Council inspection report of 13 November 2020 (Document 4.2, Page 175 of the Board's file), the evidence was that:

(a) **Anchor piles not compliant, too high, need to be changed to braced piles** – The Respondent stated that he followed the consented plans, and he was assured by the owner that the site had been surveyed

(b) **Decisions on anchor v brace piles** – The Respondent followed the consented plans and believed that they reflected what was needed. He did not do an on-site assessment of final site levels to ascertain whether an anchor or brace pile was appropriate. It was the Respondent's evidence that the designer said he could change from/to anchor/brace pile after discussion with the Council Inspector and that this would be a minor variation. However, the Respondent accepted, when put to him by the Board, that a change at the inspection stage would have been after he had dug the holes, poured the concrete, and lowered the house, and so already determined whether it was an anchor or brace pile. He was aware anchor piles could not go over 600mm above ground, but when asked what his process was around this, he was unable to remember and thought there would have been some sort of discussion with the designer. The Respondent acknowledged the designer's email, which stated – *"I spoke to Craig Hayes and instructed him to add the braces where required, and to carry on and get it done, that it isn't a problem."* (Document 8.2.1.3, Page 394 of the Board's file). The Respondent then explained that he did not follow this instruction at this stage as he was waiting to discuss it with the

Council Inspector. He stated that he did not speak to the designer about this issue before the concrete was poured for the piles or before the house was lowered onto the piles.

(c) **Alternate attachment of beam to bearer to hold up short joists** – the Respondent's position in his written submission was that *"this alternative attachment was necessary as the floor joists would otherwise have been unsupported as the consented plans were missing an extra row of piles*." (Document 8.2.1.2, Page 307 of the Board's file). Following discussions with the designer, the Respondent agreed this was the safest solution and believed it was a minor amendment that could be discussed with the Council Inspector when he came to site in November.

(d) **Bearer to joist connection does not comply with NZS3604:2011** – this solution was discussed with the designer. However, the Respondent accepts that it failed inspection.

(e) **Brace slope at 60 degrees**– the Respondent accepted this. (Refer to paragraph 22(c) above).

(f) **Amendment needed to show change in bracing type locations –** the Respondent believed this could be done on-site with the Council Inspector

(g) **Subfloor access and insulation** –This was not the Respondent's responsibility and was being undertaken by the owner.

[24] The Board notes that, at the time of the Respondent finishing on site, he had not lodged any applications for amendments or minor variations.

[25] Photographs of bearer support and fixings, taken at the Council inspection, were put to the Respondent (Document 4.2, Pages 177-180) as being inadequate. His response was that he was *"not entirely sure*", but that he accepted some would not pass final inspection, but there was still work to complete.

[26] With regard to the design work allegation, the Respondent gave written evidence that he spoke to the designer as necessary and specifically on the alternative attachment of beam to bearer and the change to bracing type locations (Document 8.2.1.2, Pages 307 and 309). He referred to discussions with the designer on 1 October 2020, when the brace piles were being constructed (Document 8.2.1.2, Page 288 of the Board's file). He stated – *"he did not carry out design work and did not carry out or supervise building work that was outside of his competence."* (Document 8.2.1.2, Page 309 of the Board's file.)

[27] The Respondent's oral evidence at the hearing was that,

(a) He went off the plans and believed he could assess and make changes later, in discussion with the Council Inspector.

(b) There were no written instructions from the designer and no detail given from the designer about which way the bracing should run.

(c) Any discussions with the designer were on the phone, there were no confirming emails, and he did not *"usually jot down notes with designer".*

(d) He could not recall what was discussed with the designer in the 1 October 2020 telephone call, but he thought it was about the extra bearers.

[28] The Respondent's consistent response to most issues was that he had followed the subfloor design plan to the greatest extent possible. However, in answering questions from the Board, the Respondent often replied that he could not recall or remember exactly.

[29] In respect of the record of work, the Respondent's written response was that *"he did not consider the works to be completed*." (Document 8.2.1.2, Page 309 of the Board's file). He advised the Board at the hearing that a record of work had now been given to the Council but not to the owner. He was asked to submit a copy of the record of work to the Board after the hearing. The Respondent said that on this job, there was only compliance work in respect of the piles to be completed when he left the site in November 2020. He was concerned about giving a record of work as others may have been on the site and done work since he left. An email of 16 February 2021 (Document 8.2.1.3, Page 385 of the Board's file) from the Respondent to the owner stating that he was not comfortable coming back to site, was put to the Respondent. He did not accept that this meant as, at that date, he had no intention of returning. However, the Respondent did accept that the trespass notice of 13 May 2021 (Document 8.2.1.2, Page 298 of the Board's file) was a definite point at which there would be no return to the site.

Board's Conclusion and Reasoning

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

(a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and

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

and **should** be disciplined.

[31] The Board has decided that the Respondent **has not** breached section 314B of the Act (s317(1)(h) of the Act).

Negligence and/or Incompetence

[32] Negligence and incompetence are not the same. In *Beattie v Far North Council*[7] Judge McElrea noted:

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

[33] 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 Courts[9].

[34] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others,*[10] it was stated as *"an inability to do the job"*.

[35] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[11]. 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 or, in other words, whether the conduct was serious enough.

[36] In terms of seriousness in *Collie v Nursing Council of New Zealand,*[12] 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.*

[37] In *Pillai v Messiter (No 2)*[13] the Court of Appeal stated:

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

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[7] Judge McElrea, DC Whangarei, CIV-2011-088-313
[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] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[11] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[12] [2001] NZAR 74
[13] (1989) 16 NSWLR 197 (CA) at 200

[38] The Board notes that the Respondent did accept that he had got some things wrong – the bent nail plate, bearer alignment and fixings, brace piles with an angle greater than 45 degrees, and the anchor piles over 600mm above ground.

[39] However, he did not take into consideration the notation on the consented plans, which allowed him to swap out anchor piles for braced piles. This would have required a redesign by the designer as no brace direction or set out was shown on the plans for any alternative to the anchor piles. The Respondent did not do this – he simply blindly followed the consented plan. Once the holes for the piles were dug and installed, the decision on anchor v braced piles had, effectively, been made. The Respondent should have thought about the issue before this point. Instead, the Respondent planned to leave it to be discussed with the Council Inspector after the work had been carried out.

[40] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not rely on the building consent authority to identify compliance failings and to assist them to get it right.

[41] A Licensed Building Practitioner is also expected to know and understand the requirements set out NZS3604, an acceptable solution that ensures compliance with the Building Code, and, in particular, bracing angles. Furthermore, it is also not acceptable practice to bolt through only 60/125 mm of the timber pile. (Document 4.2, Photographs at pages 177 and 178 of the Board's file). The method used compromised the structural integrity of the connection.

[42] The Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had 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.

<u>Outside of Competence</u>

[43] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)). It is the second that is of relevance in this case.

[44] As regards working outside of one's competence, section 314B(b) of the Act provides:

> *A licensed building practitioner must—*
>
> *(b) carry out or supervise building work only within his or her competence.*

[45] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect, it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work then it may be that they are working outside of their competence.

Such a situation could occur for example, where a person holding a carpentry licence who has only ever built simple single-level dwellings unsuccessfully undertakes a complex multi-level build. Likewise, if a licensed building practitioner undertakes work outside of their licence class,[14] then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the building work is noncompliant or is in some way deficient.

[46] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority *is Z v Dental Complaints Assessment Committee,*[15] where Justice McGrath in the Supreme Court of New Zealand stated:

> *[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*
>
> *[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

[47] The Respondent followed the consented plans, but what he encountered on the site did not necessarily work in accordance with those plans. He continued with building and was planning to discuss the issues (and specifically the anchor/braced pile choice) with the Council Inspector. This was a muddled approach. The Respondent, at that point, should have sought clear direction from the designer.

[48] However, based on the evidence heard at the hearing, the Board finds the allegation that the Respondent carried out design work in respect of on-site solutions developed and implemented is not, on the balance of probabilities, proven.

[14] Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.
[15] [2009] 1 NZLR 1

Record of Work

[49] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[16].

[50] 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.

[51] The Board discussed issues with regard to records of work in its decision C2-01170[17] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[52] 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.

[53] 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".

[54] 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 matter. The build progressed through to November 2020. The Respondent left the site shortly after the council inspection of 13 November 2020. The Respondent gave evidence that he believed he would return to site, but his email of 16 February 2021 (Document 8.2.1.3, Page 385 of the Board's file), signalled he did not want to return, and the trespass notice of 13 May 2021 definitely established the point at which there was no prospect of returning.

[55] The Respondent gave evidence that he has now completed a record of work, which was given to the Council on 22 February 2022, but this has not yet been provided to the owner. He agreed to submit a copy of the record of work to the Registrar. It is arguable that completion occurred as early as February 2021 but certainly by the

[16] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[17] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[18] [2018] NZHC 1662 at para 50

time of the trespass notice in May 2021, the Respondent's involvement with the project was over. 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.

[56] 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.

[57] In this instance, the Respondent said that he did not consider his work was completed and he was concerned to give a record of work when others may have been working on site after he left.

[58] In past cases, the Board has held that where it becomes apparent that a licensed building practitioner will not be continuing, then their work will be considered to have been completed, and they will be required to provide a record of work soon thereafter. As such, the point in time had arrived when the Respondent knew or ought to have known that his restricted building work was complete and that a record of work was due.

[59] To require otherwise would defeat the purpose of the record of work provisions in the Act, which are designed to create a documented record of who did what in the way of restricted building work under a building consent. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out. If a record of work is not provided because the intended work is not complete, then there would be no such record.

[60] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

[61] The Respondent, in his submissions, has not understood what a record of work is for. It is not a statement as to the quality or compliance of the restricted building work. It is not any form of sign off or undertaking. It is not to be confused with a producer statement. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability that would not otherwise exist as section 88(4) provides:

> *(4) A record of work given under subsection (1) does not, of itself, —*
>
> *(a) create any liability in relation to any matter to which the record of work relates; or*

> *(b) give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*

[62] It is also important to note that a record of work provides an opportunity to not only record what was carried out or supervised but also what was not done, completed, or supervised. As such, if the Respondent had concerns about future liability for work that he had not carried out or supervised, he could have used the record of work to capture those concerns.

[63] In this instance, the Board finds that the reasons provided by the Respondent do not establish a "good reason".

Penalty, Costs and Publication

[64] 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.

[65] 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

[66] 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.*

[67] 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[20] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[68] The negligence offence is at the lower end of seriousness, and the record of work matters are at the lower end of the disciplinary scale. There are no aggravating or mitigating factors present. As such, the fine is set at $2,000. This is an amount that is consistent with other penalties imposed by the Board for similar offending.

Costs

[69] 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."

[70] 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].

[71] 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*

[72] Based on the above, the Board's costs order is that the Respondent is to pay, toward the costs of and incidental to the Board's inquiry, the sum of $3,500, which is the Board's scale costs for a half-day hearing.

Publication

[73] 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.*

[74] 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.

[75] 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

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[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

grounds for suppression within the criminal jurisdiction[25]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[26]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[27].

[76] 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.

[77] Based on the above, the Board **Will Not** order further publication.

Section 318 Order

[78] 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(l)(iii) of the Act.** **In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**

[79] 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

[80] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Friday 29 April 2022**. 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.

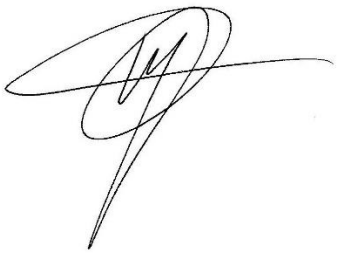
[25] Refer sections 200 and 202 of the Criminal Procedure Act
[26] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[27] ibid
[28] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[81] 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

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

Signed and dated this 6th day of April 2022.



Mr M Orange
Presiding

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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.