**Before the Building Practitioners Board**

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| | BPB Complaint No. CB25877 |
| Licensed Building Practitioner: | Adam Hutchison (the Respondent) |
| Licence Number: | BP 134079 |
| Licence(s) Held: | Bricklaying and Blocklaying – Structural Masonry, Veneer |

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**Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner**

**Under section 315 of the Building Act 2004**

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| Complaint or Board Inquiry | Board Inquiry |
| Hearing Location | Queenstown |
| Hearing Type: | In Person |
| Hearing Date: | 8 December 2022 |
| Decision Date: | 21 December 2022 |

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2

**Appearances:**

M R Walker and B W D Alexander 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 Finding:**

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

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## Summary of the Board's Decision

[1] The Respondent carried out and supervised building work in a negligent manner and failed to provide a record of work on completion of restricted building work. He is fined $2,000 and ordered to pay costs of $1,875. A record of the disciplinary offending will be recorded on the public register for a period of three years.

**The Board**

[2] The Board is a statutory body established under the Building Act.[1] Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

**The Charges**

[3] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[2] to hold a hearing in relation to building work at [OMITTED]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:

(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, as set out in the report of Mr [OMITTED] dated November 2019 and the Queenstown Lakes District Council Half high veneer/stone inspection record dated 4 February 2019; and/or

(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**

[4] 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*[3] and in New Zealand in *Dentice v Valuers Registration Board*[4].

[5] 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,*[5] 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*

[1] Section 341 of the Act.
[2] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[3] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[4] [1992] 1 NZLR 720 at p 724
[5] [2016] HZHC 2276 at para 164

> *maintained in order to protect clients, the profession and the broader community."*

[6] 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[6]:

> *… 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.*

[7] 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 breaches the Code of Ethics for Licensed Building Practitioners[7] (the Code) or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

[8] 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**

[9] 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.

[10] 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.

**Consolidation**

[11] The Board may, under Regulation 13, consolidate two or more matters into one hearing but only if the matters are, in the opinion of the Board, about substantially

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

[7] a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022 by clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

the same subject and the complainant and the licensed building practitioner in respect of each matter agrees to the consolidation.

[12] The Board sought agreement for consolidation of this matter with complaint CB25688, a complaint that was made about [OMITTED], a Licensed Building Practitioner and which led to this inquiry. The consent of all those involved was forthcoming. The two matters were consolidated.

**Background to the Board Inquiry**

[13] As noted above, the Board Inquiry arose out of a complaint that was made about [OMITTED]. In responding to the complaint about him, he identified the Respondent as the Licensed Building Practitioner who had carried out or supervised the building work complained about.

**Evidence**

[14] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[8]. 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.

[15] 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.

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

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| Adam Hutchison | Respondent |
| [OMMITTED] | Respondent in CB25688 |
| [OMMITTED] | Witness, [OMMITTED] |
| [OMMITTED] | Witness, Licensed Building Practitioner, [OMMITTED] |

<u>Background</u>

[17] [OMMITTED] was contracted by [OMMITTED] to complete the brickwork on a new residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion.

[18] At about the time [OMMITTED] was engaged, [OMMITTED] contacted [OMMITTED] to see if he had any work [OMMITTED] could undertake. [OMMITTED] subcontracted the work to [OMMITTED].

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

[19] The work was carried out on a per square metre rate. [OMMITTED] supplied the sand, cement, bricks and brick ties, the latter of which was suitable for a high earthquake zone. [OMMITTED] stated that he did not restrict the quantity of materials supplied.

[20] [OMMITTED], in turn, instructed the Respondent, who was in the employ of [OMMITTED] at the time, to carry out the brickwork in conjunction with two of [OMMITTED] other employees. [OMMITTED] was not able to recall the details of the two employees who had worked for him for approximately six months to one year. He noted he may have been able to provide employment records. The Respondent gave evidence that they were two English labourers named [OMMITTED] and [OMMITTED].

[21] [OMMITTED] was, at the time, engaged on another site. He stated he had not viewed the plans and specifications for [OMMITTED] but viewed it as a typical brickwork job. He could not recall if he attended the site during the build. The Respondent gave evidence that [OMMITTED] attended on three occasions, at the beginning, the middle and at the end of the job.

[22] The Respondent worked on-site with the two employees. In a statement provided for the hearing, he stated that [OMMITTED] was supervising. At the hearing, he accepted that he was supervising their work. He stated that they worked as a team and generally on the same profiles of the dwelling. The Respondent described their skill level as “passable” but noted that he had to pull them up on the quality of their work “from time to time”. Examples he gave were the quality of the cut edge of bricks and bricks dipping below the line.

[23] The Respondent completed the set out using profiles. He stated that he reviewed the consent prior to undertaking the work. The Respondent stated he used a 5:1 mortar mix for the brickwork and that he did so on [OMMITTED] instructions. [OMMITTED] stated that he always used a 5:1 ratio and that he understood it was standard industry practice in the Queenstown region. [OMMITTED] had not consulted any literature to determine the correct ratio.

[24] [OMMITTED] called for inspections. The Respondent attended them and stated that he checked the work prior to the inspections. He noted the rebates were “a bit in and out” but were within tolerances. He did not note any other significant issues.

[25] [OMMITTED] referenced that the dwelling passed a Final Inspection and that a Code Compliance Certificate was issued on 29 May 2019.

<u>[OMMITTED] Report</u>

[26] [OMMITTED] outlined his expertise in brickwork commencing in 1995 and which included working with manufacturers, developing a two-storey brick system, work as a standards committee member, and writing publications.

[27] [OMMITTED] attended the site on 19 November 2019 and completed a report dated 21 November 2019 on instruction from [OMMITTED]. He noted that he tried to keep costs to a minimum in attending the site and developing his report but that issues were obvious on a visual inspection. He produced a report and affirmed the observations and findings of that report at the hearing. The issues he noted were:

> 1. *Numerous mortar joints on this dwelling were outside the limitations of 7mm – 13mm in thickness. They ranged from approximately 4mm to 18mm.*
>
> 2. *The mortar joints had not been tooled smooth as required but brushed.*
>
> 3. *Door sills did not slope the minimum 15 degrees, as required.*
>
> 4. *Numerous perpend mortar joints had not been totally filled with mortar, also as required.*
>
> 5. *There was loss of mortar bond between bricks and mortar, evident in most panels.*
>
> 6. *There were loose bricks, particularly in the top rows, and adjacent to window and door joinery.*
>
> 7. *The quality of the mortar was poor, and in my professional opinion, was well below a bond strength of 200kPa and a compressive mortar strength of 12.5MPa.*

[28] [OMMITTED] recommendation was that the brickwork be removed and replaced which was what was ultimately done by [OMMITTED] to remediate the issues. [OMMITTED] noted that he does not make such a recommendation lightly and had only done so on about 5 or 6 occasions in the past 30 years. His report noted:

> *It would be impossible to repair this veneer. There are just too many defects, and of course the over-riding problem is the mortar quality.*

[29] [OMMITTED] noted that brickwork should be carried out in accordance with NZS 4210:2001. That standard was referenced in multiple places in the building consent. He expressed his concern that the mortar ratio was 5:1, which he stated would not have had sufficient bond or compressive strength, particularly in an earthquake zone and given the environmental conditions. [OMMITTED] report noted that 4210 calls for a minimum bond strength of 200kPa and a minimum compressive strength of 12.5MPa. His opinion was that a 4:1 ratio should have been used and that the only reason to use a 5:1 ratio would have been to save costs.

[30] Further, with respect to the quality of the mortar, [OMMITTED] report stated:

> *The most serious issue with this brick veneer, is the quality of the mortar. Everything on this veneer could have been installed perfectly, however, if the mortar quality is poor, the veneer becomes totally unacceptable. Having*

*mortar with good bond strength is critical to the long-term performance and security of this brick veneer. One needs confidence that the brick ties anchored into the mortar, will perform and secure this heavy-weight cladding, in a major seismic event, certainly over the next 50 years.*

And

*This mortar lacked both bond-strength and compressive strength based on the following:*

1. *There was evidence of poorly mixed mortar observed where sand was in its raw state.*

2. *Using just one hand and an 8mm flat nose screwdriver, I could scrape and easily remove the mortar from perpend joints, in a matter of seconds! If I had used my body weight with two hands on the screwdriver, it would not have been difficult to remove all the mortar; I chose not to do this. That should just be impossible. Minimal force was used.*

3. *There were numerous evidences of loss of bond, between brick and mortar, plus loose bricks. Minor earthquakes could easily cause this damage with very weak mortar, but just as likely, in fact more likely, to be the result of lack of bond strength in the mortar.*

[31] [OMMITTED] went on to note that high temperatures when laying the bricks would have impacted the mortar and that his research had indicated the bricks were laid at a time of high heat. He stated:

4. *… To ensure that the freshly laid mortar, cured correctly, and the 'hydration' process was successfully completed, the bricklayer would have needed to keep this veneer covered, and in a continual wet state for at least 48 hours …*

[32] The Respondent gave evidence that the mortar was mixed on site by a labourer and that the Cromwell sand that was used had to be dry mixed prior to water being added. He noted that if a mix was poor, it would be returned and that, at times, lumps of sand had to be pried out as laying progressed. The Respondent stated that they tried to work in the shade and that the mortar mix was made a bit wetter, and the bricks were dunked in water prior to being laid so as to compensate for the heat. Once laid, the bricks were not dampened or kept in the shade as they dried.

[33] [OMMITTED] also considered the perpend joint issue to be serious. He noted:

*I view the discovery of perpend joints that have not been completely filled as serious, and certainly would impact on the seismic performance of this veneer even if the mortar quality was acceptable. It is also what we cannot see that must be of concern.*

[34] At the hearing, [OMMITTED] stated that some tooling in of mortar in perpends would be okay but that the failings were too major and that it was a structural issue. Again, he noted that poor mortar, heat and lack of hydration when the mortar was curing could have contributed to the issue.

[35] [OMMITTED] noted that door slamming can cause bricks to loosen. In his response to the complaint made about him, he stated he went to the site two or three times to remedy the work, which included replacing chipped bricks and relaying loose bricks. At the hearing, he stated that he replaced some 20 bricks after the Code Compliance Certificate had been issued. [OMMITTED] evidence at the hearing was that he did not think the brickwork that he observed was substandard and noted that the work was passed by the Council and that a Code Compliance Certificate had been issued.

[36] In the complaint about [OMMITTED], the Complainant stated:

> [OMMITTED] *did come back to fix some of these issues but ultimately didn't attempt a permanent fix at any stage and if anything the repair jobs were worse than the original work.*

[37] The Respondent described the job as "not his proudest" and "not to his own standards".

Remediation

[38] [OMMITTED] gave evidence that the bricks were taken down and [OMMITTED] paid for replacement bricks after the Code Compliance Certificate had been issued. The work was not consented. [OMMITTED] paid for the labour, with the Respondent providing assistance to deconstruct the cladding. The Respondent had intended to assist with the reconstruction but was prevented from doing so by an injury. The labour costs have been on charged to [OMMITTED].

[39] The replacement bricks were laid using a 4:1 sand-to-cement ratio. No issues with brick ties or cavity were noted during deconstruction but there were some loose bricks toward the top courses of bricks with the bottom courses being more resistant to deconstruction.

Record of Work

[40] [OMMITTED] stated, at the hearing, that he thought he had provided a record of work to [OMMITTED] by email but not to the Territorial Authority. He was asked to provide a copy together with a copy of the email correspondence. Following the completion of the hearing, he provided a copy of the inspection report but not of the record of work or email to [OMMITTED].

[41] The Respondent stated that he had not provided a record of work as he considered that it was [OMMITTED] responsibility to provide one.

[42] The Board obtained a copy of the Territorial Authority file. It did not contain records of work from the Respondent or [OMMITTED].

Post Hearing Submissions

[43] After the hearing, the Board received a written closing statement from a representative of the [OMMITTED]. The submission noted the successful completion of "over 100" other jobs and that the work had passed inspections. He laid responsibility for any failings with the Respondent:

> *It was clear from evidence presented at the hearing* [OMMITTED] *never laid a brick and was let down by poor workmanship of Adam Hutchison [LPB 134079] something he acknowledged at the hearing.* [OMMITTED] *oversaw the job and supervision of labourers,* [OMMITTED] *and* [OMMITTED].

[44] *Counsel for the Respondent Hutchison provided a written submission. He noted:*

> *[8] Mr Hutchison's culpability for any negligent or incompetent building work is significantly mitigated for the following reasons:*
>
> *(a) There were multiple other tradesmen working on site;*
>
> *(b) Mr Hutchison took several proactive steps to improve the quality of the restricted building work;*
>
> *(c)* [OMMITTED] *directions to his employees significantly exacerbated issues;*
>
> *(d) The remedial work undertaken by* [OMMITTED] *appears to have created further issues; and*
>
> *(e) Mr Hutchison attempted to remedy issues upon learning the owner of the property was concerned about the work.*

[45] With regard to a record of work, the submissions noted:

> *[18] It was Mr Hutchison's understanding that upon completion of work at the Property,* [OMMITTED] *was the only individual required to provide a RoW to QLDC.*
>
> *[19]* [OMMITTED] *called for code compliance inspection and half-high and final residential inspections were passed; unfortunately, Mr Hutchison was of the mistaken belief a RoW had been provided and this was sufficient to discharge all obligations.*

[46] Counsel summarised the Respondent's position as follows:

> ***Summary***
>
> *[20] Mr Hutchison has provided a consistent and reliable narrative from the outset of proceedings. He has accepted responsibility where appropriate and should be given credit for as much.*

*[21] Given Mr Hutchison's relative inexperience as a licenced building practitioner during his time working on the property, alongside various mitigating factors, Counsel invites the Board to adopt an educational and lenient approach, should it consider a penalty necessary.*

**Board's Conclusion and Reasoning**

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

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

[48] 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*[9] test of negligence which has been adopted by the New Zealand Courts[10].

[49] The New Zealand Courts have stated that an assessment of negligence 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.

[50] 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[12]. 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

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

[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 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

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[13].

[51] 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.*

[52] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[14] and be carried out in accordance with a building consent[15]. 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.

[53] 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.*

[54] The Respondent was the Licensed Building Practitioner who carried out and supervised the brickwork under the building consent. There was clear evidence from an expert that the brickwork had been completed in a manner that was substandard to the point where it had to be replaced.

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[13] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[14] Section 17 of the Building Act 2004
[15] Section 40(1) of the Building Act 2004
[16] [2001] NZAR 74

[55] Looking at the Respondent's conduct, firstly, he knew that a 5:1 mortar mix was inadequate and whilst he received instructions to use that mix, he should not have. The Board heard evidence that there were sufficient materials for a 4:1 mix. The Respondent had reviewed the building consent. He was required to follow its requirements. He did not, and, as a Licensed Building Practitioner, he is required to take responsibility for his own work and to say no if he is given instructions that will compromise the safety and compliance of the building work to be undertaken.

[56] Secondly, the Respondent was aware that there were issues with the brickwork as it progressed. In evidence, he noted issues with the mortar mix used and issues with the work of [OMMITTED] other employees. He did raise the issues but did not ensure that they were remediated. Further, the Respondent should have been aware that the work was not being completed to the required standards as it progressed. On his own evidence, there were issues with the mortar, and the issues noted in [OMMITTED] report would have been evident during the build. Put simply, the brickwork was not completed in accordance with the building consent or the building code.

[57] Thirdly, the Respondent did not take into consideration or take action to compensate for weather conditions. He should have ensured that steps were taken to counter the effects of heat during the laying and drying of the bricks and mortar.

[58] The Board noted that the staff were [OMMITTED] employees. The Respondent accepted that he was supervising the other staff and, on the basis of the definitions in the Act of supervise, he was the supervisor. As such, he is accountable under the licensing regime for the quality and compliance of their work. That the staff were not his employees may be a mitigating factor in terms of penalty.

[59] The Board also noted that the Respondent was employed by [OMMITTED]. Again, that does not release him from his obligations as a Licensed Building Practitioner. He was accountable and responsible for the work he was carrying out and supervising. Under the licensing regime, a Licensed Building Practitioner cannot abdicate their responsibilities by claiming to be an employee. Licensing regime accountability and contractual accountability should not be confused.

[60] Turning to seriousness, the conduct can not be described as inadvertent or as an oversight. It was a fundamental failure to carry out and supervise building work to an acceptable standard. As such, and 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.

[61] As an aside, the Respondent should note for the future that the work to remove and replace the brick cladding required a new building consent. This was because a Code Compliance Certificate had been issued, and the cladding had failed to meet Building

Code durability requirements. As such, the work could not be carried out under the exemptions to a building consent in clause 1 of Schedule 1 of the Act.[17]

Record of Work

[62] 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[18].

[63] 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.

[64] The Board discussed issues with regard to records of work in its decision C2-01170[19] 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.

[65] 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.

[66] 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*[20] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

[67] 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.

[68] In this matter, the Respondent's restricted building work was completed at or prior to the final inspection, which was in February 2019. The Respondent accepted that he had not provided a record of work. He was operating under the mistaken belief that [OMMITTED] would provide the record of work.

[69] 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.

[17] Refer clause 1(3)(c) of Schedule 1.
[18] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[19] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[20] [2018] NZHC 1662 at para 50

[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. There were no good reasons.

[71] The Board recommends that the Respondent update his knowledge and understanding of the record of work framework. He should obtain and study the Ministry of Business Innovation and Employment Regulatory Handbook to assist him in his understanding of the regulatory environment within which he operates.

**Penalty, Costs and Publication**

[72] 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

[73] 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

[74] 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*[21] 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.*

[75] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[22] 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.

[76] The Board adopted a starting point of a fine of $3,000, an amount which is consistent with other fines imposed by the Board for similar levels of offending.

[21] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[22] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

There are no aggravating factors, but there are mitigating factors. Some of those were raised by Counsel in the closing submissions received. Included was his position as an employee, the impact of [OMMITTED] staff, and his willingness to assist with the rectification of the issues. Taking those factors into account, the Board has reduced the penalty to $2,000.

[77] In reaching the above penalty decision, the Board has also taken into consideration the conduct of Mr Hutchison and the comparative culpability of each to ensure consistency in the penalties imposed.

Costs

[78] Under section 318(4) of the Act, the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[79] 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[23].

[80] In *Collie v Nursing Council of New Zealand,*[24] 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.*

[81] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,[25] the High Court noted:

> *[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
>
> *[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

[23] *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.
[24] [2001] NZAR 74
[25] CIV-2011-485-000227 8 August 2011

[82] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex. Adjustments based on the High Court decisions above are then made.

[83] The matter was set down as a half-day consolidated hearing. The Board's scale costs for a half-day hearing is $3,750. The Board sees no reason to depart from this amount. However, given that the matter was consolidated, it is appropriate that the costs be split between the two respondents. As such, the costs order is set at $1,875.

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[26]. 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[27]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[28]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[29]. 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*[30].

[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[31]. 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.

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

**Section 318 Order**

[89] 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 $1,875 (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.** |

[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.

**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 **03 February 2023.** 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/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 12th day of January 2023.

**M Orange**
Presiding Member

[94]

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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.*