Before the Building Practitioners Board

	BPB Complaint No. CB25071
Licensed Building Practitioner:	Michael Jonker (the Respondent)
Licence Number:	BP 126508
Licence(s) Held:	Carpentry

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

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	On the Papers
Scheduled Hearing Dates:	25 July 2019 and 11 September 2019
Decision Date:	27 February 2020

Board Members Present:

Mel Orange, Legal Member (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2

Procedure:

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

Board Decision:

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

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

Contents

Introduction

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

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

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

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

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

(d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3]*.*

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*[4] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied … . The disciplinary process … exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

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

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

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

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

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

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

25 July 2019 Hearing

[7] The matter was set down as an in-person hearing. The Respondent, who had not engaged in the investigation process or provided a response to the allegations, appeared. As a result of the Respondent's conduct at the hearing the Board found it necessary to abandon it. A Board Minute dated 26 July 2019 was issued outlining the reasons why the hearing was abandoned.

11 September 2019 Hearing

[8] As a result of security concerns and the Respondent's conduct at the first hearing the Board decided to reschedule the matter to be heard on the papers. The Respondent sought leave to appear by video conference. In a Board Minute dated 29 July 2019 the Board issued a direction that the Respondent was to file a written response to the complaint and that he could, as part of the response, seek leave to appear by video conference.

[9] On Friday 6 September the Respondent provided a written response and submission. His accompanying email noted:

> *I have only just received this email as it had been labelled as spam by my provider. i have given my box of information to a new legal team looking in to this since our filmed hearing. i have attached a small letter and what information i have been able to gather this morning can i forward this straight to mel orange for review please*

[10] No formal request was made to appear by way of video conference. The Respondent did, however, note in his penultimate paragraph:

> *All my information relevant to both my legal cases are now with a legal team whom since the first board meeting have been looking at my case. If you need anything further from me please feel free to call me on 0272500181 or email me but please could you still message my phone as the last emails have been listed as spam by the service provider, this also the reason for my late reply. I did speak to … about the case via the phone but did not get the email regarding dates until last night whilst working on something else.*

[11] At the hearing the Board noted that it had a substantial amount of documentary evidence before it but that in reviewing the evidence, it was noted that, in order for it to make a decision, a limited amount of further evidence was required. The Board decided that it would adjourn the hearing to allow the additional evidence to be

sought. An adjournment would also allow the Respondent to provide submissions from his legal representative, should he elect to do so.

Evidence Sought

[12] The Board directed that the Board Officer is to obtain the building consent authority (BCA) file in respect of building consent BC20176270 including all BCA inspections undertaken and all documentation relating to minor variations and/or amendments to the building consent. The file was to be provided to both the Complainant and the Respondent to allow them to make further written submissions.

[13] The Board also directed that the Respondent is to provide written answers to the following questions:

(a) who carried out the installation of the:
  (i) barges;
  (ii) aprons;
  (iii) flashings;
  (iv) roof; and
  (v) skylights.

(b) if the person or persons who carried out the work listed above was not a licenced building practitioner then who was the licensed building practitioner(s) that supervised the work;

(c) what process was used and who was consulted to allow for the increased number of skylights installed in the roof;

(d) provide copies of all documentation held in respect of building consent minor variations and/or amendments for the increased number of skylights installed in the roof;

(e) who carried out or supervised the construction of the garage trusses noted by the BCA in a Site Notice dated 16 October 2018 as appearing to have been site constructed and if they were site constructed advise what process was used to ensure compliance with the building code and provide documentation held to substantiate compliance; and

(f) when was the record of work noted in the submission of 6 September 2019 provided to the owner and to the territorial authority.

[14] Allowance was also made for the Complainant to provide submissions in response to anything filed by the Respondent.

[15] The building consent authority file was received.

[16] No response or further submissions were received from the Respondent.

[17] The Board proceeded to a make a decision.

Evidence and Inquiry Process

[18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[19] 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.

[20] The Respondent was contracted, by way of his company Migem Builders Limited, a Lockwood franchise holder, to build a new residential dwelling for the Complainant. A building consent was issued for the construction on 1 September 2017 and construction started on 1 November 2017. The Respondent finished working on the build on or about 21 August 2018 and the Migem contract was cancelled on 27 August 2018.

[21] The Complainant alleged the Respondent had been negligent in carrying out building work and/or that he had not carried out the build in accordance with the building consent. The main issue raised by the Complainant was the compliance of the roof which she noted failed roof inspections carried out by the building consent authority on 9 April 2018 and 13 April 2018. The Complainant subsequently consulted an independent roofer and was advised the roof will have to be mostly replaced.

[22] Other issues raised by the Complainant included:

(a) a failure to notify the Council of changes to the consent as regards an increased number of rooflights;

(b) a Council audit inspection on 16 October 2018 which noted:

> *There are a number of outstanding failed inspections and also unfinished and unacceptable works. These have been identified through an onsite inspection and review of documentation and photographs supplied by the owner and consultant;*

(c) a WorkSafe Prohibition Notice issued for non-compliant scaffolding;

(d) a failure to provide a record of work; and

(e) conduct which may have brought the regime into disrepute.

[23] With regard to disrepute the Complainant noted threats made including to “pull down the Complainant’s house board by board”. The Board also noted threatening and inappropriate nature of the Respondent’s communications with other parties and in particular an email to Lockwood dated 22 August 2018.

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

[24] Following the termination of the contract a commercial dispute ensued between the Complainant and the Respondent. A failed mediation resulted in the Respondent being trespassed by the Complainant.

Roofing

[25] The pre-roof inspection dated 9 April 2018 was noted as a "fail" as a result of the inspection being cancelled on the day by the Respondent who was not well. The pre-roof inspection on 13 April 2018 was also cancelled on the day by the Respondent.

[26] A pre-roof inspection did take place on 10 May 2018. The Respondent was present. The inspection was noted as a "fail" due to outstanding items not being resolved.

[27] A further failed pre-roof inspection of 13 August 2018 noted the Respondents attendance and that the Respondent had constructed the garage trusses. An engineer's review and written approval of them was required.

[28] A pre-roof inspection on 11 October 2018 was cancelled on the day.

[29] There were no roof inspections noted in the file. The next inspection was the audit inspection of 16 October 2018.

[30] The Complainant indicated in a phone interview that the Respondent had carried out the roofing work. She noted in the interview that the Respondent is not a qualified roofer and that the roof leaks when it rains.

Audit Inspections

[31] An Audit Inspection dated 16 October 2018 carried out by the building consent authority noted:

> *Attended site for an audit inspection of a two storey lockwood dwelling. There are a number of outstanding failed inspections and also unfinished and unacceptable works. These have been identified through an onsite inspection and review of documentation and photographs supplied by the owner and consultant.*
>
> *The roofing and associated flashing are missing, incomplete and poorly finished. Barges, junctions, aprons and box corners will need to be made good or replaced also some weather boards are not fully installed. Skylights are currently covered and cannot be inspected, the home owner has indicated that this is due to leaking. There are also signs of damage to some roofing sheets. The roofing work should be carried out by an appropriately qualified person and documentation supplied on completion.*
>
> *The deck structure and load transfer is not yet complete and the exterior beams are temporarily propped onto the scaffold boarding.*
>
> *Garage trusses appear to have been constructed on site, these require Engineers verification for suitability.*
>
> *Internal stair tread depths are not uniform.*

[32] The audit inspection was supported with photographs of the noncompliant work. The inspection also noted:

> *These issues are to be addressed prior to further inspection and the scaffold and unsafe areas require appropriate tagging.*

<u>Independent Review of Roofing</u>

[33] In a letter dated 17 June 2019 to the Board the Complainant noted:

> *The property in question [Omitted] has recently had to have the roof reroofed due to incompetent workmanship, water has been leaking into the house, this was done by Michael Jonker the builder, who is not a qualified roofer and the respondent in this complaint. [Omitted] who put the new roof on, have done a summery and taken photos which I am sending to you. These are important for my case, because the reroofing has just been completed, I did not have these photos available for you at the time of investigating my complaint. Hope these will go towards my complaint as Jonker's incompetence has cost me another$44,840.75 for the new roof.*

[34] [Omitted], a licensed building practitioner, provided a summary of the roofing issues together with photographs of what was found. He noted:

> 1. *Flashings where fitted incorrectly and missing*
> 2. *Roofing underlay was run the wrong way*
> 3. *There was a shortfall in materials in the ridging*
> 4. *Eave flashing where missing*
> 5. *Skylights had no flashings*
> 6. *There was a lot of damage to existing materials i.e. roofing iron*
> 7. *Lack of roof fixings*
> 8. *The support netting was loose under the low pitch roofs.*
> 9. *A lot of work was incomplete*

<u>WorkSafe Prohibition Notice</u>

[35] The Board was provided with a Prohibition Notice dated 15 October 2018 issued to the Complainant as the owner of the property. It noted:

> *Observed non compliant scaffold erected by Migem Builders Ltd giving rise to a risk of fall from height.*

Respondent's Submissions

[36] The Respondent provided a written submission for the on the papers hearing. He discussed contractual issues not relevant to the matters under consideration. With regard to the building work under investigation he stated:

> *On page 30 of the hearing file it was made claim that inspections fail. This is not the case but as the garage and home where under the same consents but different building the fail was due to the garage no being ready and house being able to have the roof installed. The roof was left unfinished due to the trespass and theft of equipment.*
>
> *The scaffolding was under five meters apart from two tower which were being signed for by a qualified scaffolder. The notice is after trespass took place and tags had been removed. It took me 14 weeks to regather equipment from this site this including the gear of workers that I had to make redundant.*
>
> *Record of works was supplied for all restricted building work completed and will not be taking accountability for works left unfinished due to theft and trespass and others working on site.*

[37] The Respondent also made comment about a report the Complainant provided as part of the original complaint from [Omitted] a Chartered Building Engineer and Chartered Construction Manager (the [Omitted] report). He noted the report writer was a family friend of the Complainant and he submitted that he was not independent. As regard the report he noted:

> *Page 10 supplies [Omitted] as taking photos of defects which again is incompleted work.*
>
> *I also would point out the photo of the "unsupported beam" on page 35 of the hearing. This has a fixing installed inside the bean and is fixed to the wall internally. [Omitted] is not a competent Lockwood builder and does not understand the process is building these so in really incompetent in his actions and comments.*
>
> *I would also like to point out that in his photos shown uneven treads the end of the tape cannot be seen and with his personal ties to the complaint these are quite easily fabricated.*
>
> *On page 38 the poorly finished flashing. This is a standard flashing length for the building and it was the last weather board added instead of a smaller timber flashing that makes this look short this was requested by [Omitted]. This is not a defect but a variation to the home requested by the home owner.*
>
> *ON page 40 of the hearing file I not that there is a weather board noted unfinished. This has all the fixings for this weather board and has been removed by another party prior to taking the photo*

> *There is also a built-in apron flashing in the wall of dormer and the flashing to seal this was on site but unable to finish.*
>
> *This also clearly states work unfinished. This leads me to not respond to any more of the matters in [Omitted] report which is clearly contractually guided and guided by family friends.*

[38] The Respondent also made comment about the reroofing that had been completed:

> *On page 141 of the hearing file it is stated that "residential roofing" put the roof on and then report was supplied by [Omitted] this show incomplete work. Damages to the roof are rejected by myself and any ex staff member who worked on this roof,*
>
> *The areas not batted are the soffit and are outside of the building envelope,*
>
> *[Omitted] complains that I was not suitable qualified, but I hold the same qualifications as the man whom inspected and report this work, this after stating another company had installed a roof.*

[39] The Respondent's submissions also questioned the credibility of the Complainant and raised commercial matters relating to the Complainant and his Lockwood franchise. The Respondent also expressed his disagreement with a pervious Board decision about him. He did make submissions about his abilities and history as a builder.

[40] The records of work noted by him were not provided. The Council file did not contain any records of work from the Respondent.

[41] The Respondent did not reply to the questions the Board put to him.

Board's Conclusion and Reasoning

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

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

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and

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

and **should** be disciplined.

[43] The Board has also decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

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

Negligence

[45] The Board's findings of negligence relate to the roofing work which, the Board has decided was, on the balance of probabilities, carried out or supervised by the Respondent. It made that decision that the roofing complained about had been carried out or supervised by the Respondent on the basis that the Complainant identified him as the roofer, there are no records of any other licensed building practitioner having carried out or supervised the work in the building consent file or in any of the other documentation provided to the Board and the Respondent has not refuted that he did carry out or supervise the roofing work.

[46] It is also to be noted that the Board has reached its decision that the building work had been carried out or supervised in a negligent manner on the basis of the evidence in the building consent authority audit inspection, which is an independent evaluation of the building work, and the letter from [Omitted]. It has not relied on the evidence in the [Omitted] Report. The Board has rejected the evidence to the contrary filed by the Respondent which was limited to his statements. Those statements did not deal with all of the aspects complained about and were not backed up by any documentation or other supporting evidence. More importantly the weight of evidence before the Board was that the Respondent had carried out or supervised the roofing work in a negligent manner.

[47] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[48] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[9]. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[49] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act[10]. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional

[7] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[8] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[9] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[10] *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[11].

[50] 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.*

[51] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[12] and be carried out in accordance with a building consent[13]. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[52] Turning to seriousness in *Collie v Nursing Council of New Zealand*[14] 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.*

[53] Looking at the building work the Respondent submitted that the work was unfinished. What was shown in the evidence was more than just unfinished work. The evidence from both the building consent authority and the builder who completed the reroof was that there were significant noncompliance issues and that there was poor workmanship. The Complainant has stated that the roof leaks. The

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

Board also notes that if what was complained about was just about incomplete work then a reroof would not have been required.

[54] 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.

[55] The Board also considers, and the Respondent should take note, that licensed building practitioners should be aiming to get building work right the first time. In this respect during the first reading of changes to the Act around licensing[15] it was noted by the responsible Minister:

> *In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*

[56] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation[16]:

> *The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.*
>
> *We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

[57] Section 3 of the Act, which sets out the Act's purposes notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

[15] Hansard volume 669: Page 16053
[16] Hansard volume 669: Page 16053

> ***14E Responsibilities of builder***
>
> *(1) In subsection (2), builder means any person who carries out building work, whether in trade or not.*
>
> *(2) A builder is responsible for—*
>
> *(a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
>
> *(b) ensuring that building work not covered by a building consent complies with the building code.*
>
> *(3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
>
> *(a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
>
> *(b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[58] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and why it rejects the Respondent's submissions as regards the roofing work.

[59] The Respondent should note that the Board has not made a finding in respect of the scaffolding on the basis that there was insufficient evidence to substantiate the charge.

<u>Contrary to a Building Consent</u>

[60] The Board's findings in relation to building contrary to the building consent is in relation to the trusses that were site manufactured by the Respondent.

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

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

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

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

[64] The Board notes, as regards the inclusion of additional roof windows, the building consent authority accepted this as a minor variation and that it was noted as such at an inspection. As such the Board has not made a finding as regards section 317(1)(d) of the Act with regard to that matter.

[65] The same cannot be said of the roof trusses. They were manufactured by the Respondent. With regard to trusses NZS 3604:2011 provides:

> ***10.2.2 Roof trusses***
>
> *This clause applies to timber nailed-plated roof trusses.*
>
> ***10.2.2.1 Design and fabrication***
>
> *Roof trusses shall be SED in accordance with B1/VM! And manufactured by an accredited fabricator. The truss design and construction is outside the scope of this Standard.*
>
> ***C10.2.2.1***
>
> *An accredited fabricator is a company accredited by a nail-plate manufacturer to fabricate roof trusses using nail-plates and construction specifications supplied by that same nail-plate manufacturer.*

[66] Given the above the Respondent was not authorised to design or manufacture the trusses. A chartered professional engineer can design and certify trusses. The Respondent is not such a person. There was no evidence that an engineer had been used, notwithstanding multiple requests by the building consent authority for the production of engineering certification. The Respondent has not, at any point, produced any evidence that the trusses were engineer designed or certified.

[67] Pertinent to the charge under section 317(1)(d) of the Act is the requirement, noted above, that if changes are made to what is stipulated in the building consent then the correct change process must be used. In this instance an amendment would most likely have been required. When an amendment is sought no further building

work can be carried out until such time as it is granted. There was no evidence that any change process had been used, let alone an amendment process.

[68] Unlike negligence contrary to a building consent is form of strict liability offence. All that needs be proven is that the building consent has not been complied with, no fault or negligence must be established[17]. On this basis the Board finds that the Respondent has breached section 317(1)(d) of the Act.

Record of Work

[69] 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].

[70] 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.

[71] 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.

[72] 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.

[73] 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 …".

[74] In most situations' issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Completion occurred in 27 August 2018 when the contract was cancelled as, from that date on, the Respondent would not be returning to carry out or supervise any restricted building work.

[75] There is no evidence that a record of work has been provided since other than the Respondent's statement that he did provide them. He has not, however, provided any evidence to substantiate this.

[17] *Blewman v Wilkinson* [1979] 2 NZLR 208
[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

[76] 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.

[77] 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. No good reasons have been put forward.

Disrepute

[78] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111[20] and discussed the legal principles that apply.

[79] Conduct which brings or is likely to bring the regime into disrepute is not defined in the Act. The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"[21] and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[22] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant*.[23]

[80] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions[24];
- honest mistakes without deliberate wrongdoing[25];
- provision of false undertakings[26]; and
- conduct resulting in an unethical financial gain[27].

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[20] Board decision dated 2 July 2015.
[21] Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus,* search settings UK English, accessed 12/05/15
[22] [2012] NZCA 401
[23] [2012] NZAR 1071 page 1072
[24] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[25] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[26] *Slack, Re* [2012] NZLCDT 40
[27] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

[81] The Board has found, in previous cases, that inappropriate threats or language can result in a finding of disrepute. The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

> *This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*

[82] The previous cases before the Board where disrepute was upheld involved disgraceful and/or contemptable conduct. The conduct in this instance was not of the same nature and was not as serious. The Board has accordingly decided not to uphold the ground of conduct.

Penalty, Costs and Publication

[83] 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.

[84] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make orders. Given the lack of engagement from the Respondent in the hearing process the Board will not call for any further submissions as regards these matters.

Penalty

[85] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*[28] commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

> *[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

[86] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[29] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a

[28] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[29] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[87] The Board has upheld three grounds of discipline. The negligence and contrary to a building consent matters are the most serious. It is noted that the Respondent's negligence has resulted in a new roof having to be replaced.

[88] The Respondent has submitted that he is a proficient, competent award-winning builder:

> *Everything I have ever built has been over and above what the building code states and have built some extremely nice homes. I won awards as an apprentice and thrived as builder. I was running a small team of builders on site as an apprentice as I was hugely passionate about what I did. Every piece of building work I have ever done has been in accordance with the code and I was sure to set others straight if I knew something was amiss about what I saw. This how I started contract building for repeatable companies and had a consistent flow of work. I got offered the Lockwood franchise by the director and took what I thought to be a golden opportunity, loving timber made this very appealing and the aspect of more involved carpentry. winning Lockwood house of the year in my second year with the franchise.*

[89] The Respondent has previously appeared before the Board. The conduct and findings in that matter preceded the current. Negligence was upheld in that matter[30]. The Respondent was fined $1,500. It is noted that he did not agree with those findings. It is also noted that he does not appear to have learnt from them. The Respondent has not complied with the terms of the orders made in that case. His licence has been suspended under section 319 of the Act as a result.

[90] The question for the Board is what the appropriate penalty is for the present matter. In considering this the Board has in mind the need for deterrence, which was noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[31], as being an important factor:

> *[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to*

[30] Refer C2-01801.
[31] [2012] NZAR 481

> *knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[91] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[92] The Board was minded toward suspension which is a lesser form of penalty to cancellation. It did not, however, consider that the conduct was serious enough to warrant a suspension. Given this and the other options that are open to it the Board has decided that a fine is appropriate.

[93] A fine still needs to recognise the seriousness of the matter and the Respondent's disciplinary history. Taking those and the other matters discussed into account the Board has decided that a fine of $3,500 is appropriate.

Costs

[94] 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."

[95] 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[32].

[96] In *Collie v Nursing Council of New Zealand*[33] 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.*

[97] The Board notes the matter was dealt with on the papers. This was, however, after a hearing had to be abandoned as a result of the Respondent's conduct at a scheduled hearing. As such fixing the amount of costs on the basis of an in person hearing is appropriate.

[98] The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*[34] the High Court held that it was permissible to take into account as an adverse factor when determining costs that the practitioner had responded to the complaints and discipline process in a belligerent way.

[99] The Respondent did not engage in the investigation process and was disruptive at the scheduled hearing resulting in it being abandoned.

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[32] *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.
[33] [2001] NZAR 74
[34] [2011] 3 NZLR 850.

[100] Given the above factors the Board has decided that the Respondent is to pay the sum of $2,500 toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[101] 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[35]. 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.*

[102] 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.

[103] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[36]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[37]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[38]. 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*[39].

[104] 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[40]. 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.

[105] Based on the above the Board will not order further publication. The Respondent should note that this does not mean that a suppression order has been made. The details of the Board's decision will be available on the Board's website.

Section 318 Order

[106] 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 $3,500.**

[35] Refer sections 298, 299 and 301 of the Act
[36] Section 14 of the Act
[37] Refer sections 200 and 202 of the Criminal Procedure Act
[38] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[39] ibid
[40] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**
Publication:	**The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.**
	In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[107] 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.

Right of Appeal

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

Signed and dated this 27th day of February 2020

Mel Orange
Presiding Member

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

(1) In any case to which section 317 applies, the Board may
- *(a) do both of the following things:*
  - *(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
  - *(ii) order that the person may not apply to be relicensed before the expiry of a specified period:*
- *(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
- *(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
- *(d) order that the person be censured:*
- *(e) order that the person undertake training specified in the order:*
- *(f) order that the person pay a fine not exceeding $10,000.*

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

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

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

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

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

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

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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

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