

Before the Building Practitioners Board

	BPB Complaint No. CB25856
Licensed Building Practitioner:	Darren Kingi (the Respondent)
Licence Number:	BP130785
Licence(s) Held:	Carpentry and Site AoP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	29 June 2022
Decision Date:	1 August 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
Mrs F Pearson-Green, LBP, Design AOP 2
Ms K Reynolds, Construction Manager

Appearances:

Mr C Matsis, Gault Mitchell Law, Counsel 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), 317(1)(d) and 317(1)(da)(ii) of the Act.

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Summary of the Board’s Decision

[1] The Respondent has carried out and supervised building work in a negligent manner and in a manner that is contrary to a building consent contrary to sections 317(1)(b) and 317(1)(d) of the Act. He is censured in respect of those breaches. The Respondent has also failed to provide a record of work on completion of restricted building work contrary to section 317(1)(da)(ii) of the Act. He is fined \$1,500 for the breach of section 317(1)(da)(ii) of the Act. The Respondent is ordered to pay costs of \$3,500 toward the costs of the investigation and hearing. A record of the disciplinary offending will be 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 the conduct of licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

¹ Section 341 of the Act.

The Charges

- [3] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED] Wellington. 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;
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; 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) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [4] In further investigating the allegations under sections 317(1)(b) and (d) of the Act, the Board gave notice that it would be investigating the quality and compliance of:
- (a) structural fixings;
 - (b) eco ply installation; and
 - (c) the installation of framing as regards it being plumb, square and/or straight.
- [5] The Board will also give notice that it would be investigating whether the Respondent was the supervising Licensed Building Practitioner of non-licensed persons.

Function of Disciplinary Action

- [6] 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.

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

- [7] 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 maintained in order to protect clients, the profession and the broader community.”

- [8] 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 persons⁶:

... 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.

- [9] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [10] 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

- [11] 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.
- [12] 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.

⁵ [2016] HZHC 2276 at para 164

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

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [14] 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.
- [15] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|--------------|--------------------------------------------------------|
| Darren Kingi | Respondent |
| [OMITTED] | Complainant, Licensed Building Practitioner, Carpentry |
| [OMITTED] | Licensed Building Practitioner, Carpentry |
- [16] The Respondent filed a signed witness statement with the Board prior to the hearing. It traversed his building experience, previous engagements with the main contractor and the matters the Board was investigating.
- [17] The Complainant in this matter was the main contractor for a new residential build. The Complainant engaged the Respondent as a subcontractor for the build under a building consent. The Complainant stated that he did so on the basis that he was unable to attend to the build himself and so hired the Respondent as a Licensed Building Practitioner to carry out and supervise the building work, which included restricted building work for which a record of work must be provided on completion.
- [18] The Respondent described himself as a labour-only contractor. The agreement between the Respondent and Mr [OMITTED] was a verbal one.
- [19] The fundamental issue before the Board was who was supervising those staff members.
- [20] Mr [OMITTED] and the Respondent were known to each other. The Respondent noted, in his signed statement, that he had dealt with Mr [OMITTED] on 7 previous occasions. At the hearing, the Board heard evidence that two of the previous jobs were consented, but that they may have predated restricted building work restrictions coming into force. The Respondent stated, in his affidavit, that he had not supervised any of Mr [OMITTED]'s staff on those earlier occasions.
- [21] Mr [OMITTED] stated that he supplied additional unlicensed labour for the build as the Respondent's own staff was away overseas at the time. Mr [OMITTED]'s

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

evidence was that he supplied the staff the Respondent requested as he requested it and informed them that they were to take their instructions from the Respondent. He stated that the Respondent was paid an hourly rate that was a “supervisor’s rate”. Mr [OMITTED] stated that he had no doubt that the Respondent was running the job and was supervising the staff and that he had specifically hired him as a Licensed Building Practitioner as he had two other large jobs on and could not supervise all three jobs himself. At the hearing, Mr [OMITTED] supplied two letters from subcontractors (not builders) who worked on the site. Both described the Respondent as the person running the job and instructing staff, including those supplied by Mr [OMITTED].

[22] Following the hearing, Mr [OMITTED] supplied the Board with the time records the Respondent submitted during the build. They included time records for supervision. The Respondent’s evidence was that he was only responsible for his own work and that Mr [OMITTED] was supervising Mr [OMITTED]’s employees. The Respondent stated that he would have charged a higher rate (\$75 per hour, not \$60 per hour that he did charge) if he was to be the supervising Licensed Building Practitioner and that he did not want to manage staff. The Respondent gave evidence in his signed statement and at the hearing that he had not submitted any time records for supervision or claimed any payments for supervision. He did, at the hearing, accept that he managed sub-trades on site and submitted, post the hearing with respect to time records, that the references to supervision were in respect of other trades. In the Respondent’s signed statement, he stated:

25. *The best description of the way that I worked with [OMITTED]’s workers (other than [OMITTED] and [OMITTED]) was that it was a mutual collaboration. Respect was given to each person’s capabilities. Each day would start with a meeting to plan the day’s work, pick up where we left off the previous day and how best to progress the project today. Tasks weren’t allocated; rather, they were mutually attended to. A task could be attended to individually or combined. In this manner, everyone on site may well have attended to, in some extent, every part of this project’s construction.*

26. *Consistent with this, my Record of Work, which I have attached to this witness statement marked “A” confirms there is no single item of restricted building work that was fully completed by myself.*

[23] The Respondent’s record of work, dated 19 June 2022, noted various items were supervised by an engineer and that others were carried out but not supervised. The Respondent’s engagement in the building work came to an end on or about 13 July 2021. The Respondent noted that the building work was not complete when his engagement came to an end. The build was at the batten stage, ready for cladding.

[24] The Complainant requested a record of work, and, on 19 July 2021, the Respondent stated that he would provide one. A payment dispute followed. The complaint to the

Board was made on 27 September 2021, and the Board's resolution to proceed to a hearing was made on 10 February 2022. The Respondent's record of work post-dated those events.

- [25] The Respondent submitted that he was not, prior to the matter coming before the Board, aware of the legislative requirements around records of work. He believed that, as it was not his job, he did not have to do a record of work, even for his own work. The Respondent also referred, with respect to a record of work, to the non-completion of the work and to concerns he had over the work that had been completed by others.
- [26] The Respondent also submitted that the building work under investigation, if it was substandard, did not meet the threshold to be considered serious and, on that basis, that the Respondent should not be disciplined for it. Counsel submitted that the building issues either came within acceptable tolerances or was not complete. The Respondent also laid the blame for all the building issues on Mr [OMITTED]'s staff. This included building elements where the Respondent and one of Mr [OMITTED]'s staff members worked on the same element at the same time. For example, in his statement, he stated:

32. I also note the following matters from my Record of work

30.1 Pre nailed frame installation

- o Significant alterations were carried out on the pre-nailed frames to fit the site.*
- o Changes were notified to [OMITTED]*
- o [OMITTED] was requested to advise the changes to the Pre-nail manufacturer as to the validity of their producer statement*
- o Portion of work carried out.*

30.2 The majority of connecting walls to roof structure was carried out by Luke and Ross

30.3 Steel Beam - This was never finished being installed as there was no variation documents to support the installation.

30.4 Fascia – A two person install, one at each end, me at the high end and Ross at the lower, as he struggled with heights and preferred the lower scaffold which offered more stability. His end didn't line up after the install. I can't see how that is my fault.

30.5 Ecoply - this was unfinished and not all of it was installed by me.

33. *In my view, lack of accurate information was a major cause of the problems that occurred on the job.*

[27] The Respondent also submitted that the consented documentation for the build was substandard, and Mr [OMITTED]'s project management was poor.

[28] In support of his submission that he was not the supervisor of non-licensed staff on site, the Respondent referenced an event relating to waterproofing where he raised a concern that he could not supervise it as a licensed applicator was required. The Respondent went on to state:

At this time, I also reiterated our initial conversation regarding labour and expressed that all the other workers on site are [OMITTED] employees and that [OMITTED] is responsible for their education and learnings, apprenticeships and were to be supervised by himself. He agreed. His attendance on site to instruct and supervise his employees at this early stage of construction requiring restricted work was accepted as the protocol for the future.

[29] Mr [OMITTED] denied the above conversation ever took place.

[30] The Respondent outlined the steps he said he had taken to "in good faith to try and held with the problems occurring on site".

[31] As part of the complaint, Mr [OMITTED] noted that the Respondent had not recorded his Licensed Building Practitioner number at council inspections. The Respondent's details were recorded at the first inspection. The Respondent then contacted the Council and gave the Complainant's details as the Licensed Building Practitioner for future inspections. Mr [OMITTED] gave evidence that he had not consented to the change and that he was not aware of it when it was made.

[32] Mr [OMITTED] became aware of the change as a result of a Council inspection record dated 3 February 2021. Mr [OMITTED] stated, that once he became aware of the change, he raised it with the Respondent and emailed the Council to advise that the Respondent was the Licensed Building Practitioner for the restricted building work on the site.

[33] Council inspections records noted the Respondent as the builder on-site for inspections. The Respondent stated that he could not recall if he had called for any inspections but accepted he was present for two of them. The Complainant stated that he did not call for any inspections whilst the Respondent was on the build and did not attend any inspections.

[34] The Respondent stated that Mr [OMITTED] was ordering and supplying materials. Mr [OMITTED] stated that he ordered some materials and obtained prices for bulk materials on the basis of what the Respondent advised he needed. An example of concrete supply was given. Mr [OMITTED] said the Respondent provided the volumes and he ordered the concrete. The Respondent accepted that he purchased

some materials himself, such as joist hangers and that other materials were purchased by Mr [OMITTED]'s staff and he stated they knew what was needed in response to a question about whether he provided instructions on what to purchase.

- [35] The Respondent was asked about the day-to-day running of the build. The Respondent was evasive and unclear in his answers. He noted morning meetings but the theme running through his answers was that there was a mutual understanding of what had to be done and that he did not instruct, or have to instruct, any of the staff on what was to be done or had been done. Mr [OMITTED] was not a party to the meetings. He stated he would only attend the site if the owner required his attendance.
- [36] The Respondent stated that he was not checking the work of Mr [OMITTED]'s staff, even where he was working on the same building element. The Respondent stated that Mr [OMITTED] was checking. Mr [OMITTED] stated he did not carry out any on-site quality checks whilst the Respondent was on-site and went on to state that there was no requirement or need for him to check another Licensed Building Practitioner's work and that it would be embarrassing for him to do so.
- [37] The Board also received evidence about personality issues between the Respondent and Mr [OMITTED]'s staff on site. Each side blamed the other for the issues that arose.
- [38] Mr Dickinson, who took over the build, gave evidence that there was a cross over period of about three days with the Respondent and that he considered that the Respondent was running the site. Mr Dickinson was not a Licensed Building Practitioner at the time.
- [39] Mr Dickinson described the building issues he saw on site, including that walls were significantly out of plumb. He described it as the worst work he had ever seen. The Respondent disputed the assessment. The Board was provided with evidence supporting the claims of negligent building work, including marked-up plans showing the locations of the issues (page 142 of the Board's file).
- [40] With respect to eco ply installation, the Respondent noted that access to sheets was limited due to scaffolding issues and that there was pressure to make the building weathertight. The Respondent stated that the fixing issues would have been attended to had he continued on the site. The Respondent stated that the same applied to the cavity battens in that he would have attended to them in due course. With respect to steel fixings, the Respondent noted that what was on site did not match engineering drawings and that he had raised the issue as well as design issues for plywood flashings and framing around a cavity slider.

Post Hearing Evidence and Submissions

- [41] Mr [OMITTED] provided timesheet information as requested. He noted that attendance on sub-contractors and supervision is bundled by the application that is

used. The timesheet records noted supervision entries on 65 days over the period 7 January 2020 to 30 June 2021. A total of 147.5 hours were claimed.

- [42] The Respondent filed a statement after the hearing together with an annotated version of the timesheet data sent by Mr [OMITTED] and annotated copies of invoices he had sent. In the statement, the Respondent submitted:

I have reviewed the time sheet records from [OMITTED] which were emailed to me on 30 June 2022. I have cross-checked those records against my invoices and against my diary notes.

As I understand it, [OMITTED] is suggesting that the time that I recorded under the "Attendance on Subcontractors, Supervision" category included time spent supervising [OMITTED]'s employees. That is totally incorrect. None of the time recorded under that category was for that. Rather, it was for "attendances" with subcontractors. In this regard, the "attendances" in question were almost always spending time with the subcontractors in question on site. In a small number of instances, however, it would have been doing work that related to, or was necessary for, the work to be done by a particular subcontractor. For example, in their absence, making sure conduits/pipework were secure and un-damaged when pouring concrete or backfilling retaining walls and determining if the finished heights were acceptable.

- [43] The Respondent provided a list of sub-trades that he said he had supervised. He stated that his own diary and invoice records supported his contention that he was only supervising subcontractors.

- [44] The Respondent also provided a response to the letters from subcontractors admitted into evidence by Mr [OMITTED]. The tenor of the response was:

I think those emails provide a generalised view of matters based on their relatively limited understanding of the surrounding circumstances.

- [45] Counsel for the Respondent also provided closing submissions. The submission emphasised the position that the Respondent was not responsible for any of the building work that was in issue or for the supervision of any of the other workers. The submissions also reiterated the Respondent's position that concerns with the work were not raised whilst he was on the build, and that other issues outside of the Respondent's control were to blame for any issues that may have arisen or the issues were created by Mr [OMITTED]'s employees. The submissions also summarised the Respondent's position as regards supervision noting that the on-site environment was one of collaboration, not supervision. They went on to submit that the Complainant, Mr [OMITTED], had not presented evidence that proved the Respondent was supervising.

[46] Counsel also submitted:

As to Mr Kingi's credibility, it is submitted that is clear from Mr Kingi's witness statement that he went above and beyond what he was strictly required to do to try and remedy issues with this job. It is submitted that to do so is inconsistent with someone deliberately departing from accepted standards or portraying indifference to his legal and professional obligations.

Board's Conclusion and Reasoning

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

- (a) carried out and supervised building work or building inspection work in a negligent 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 contrary to section 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).

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

Negligence and/or Incompetence

[49] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.

[50] The finding of negligence relates to the Respondent's supervision of non-licensed persons. The Board did not accept the Respondent's evidence or submissions that he was not supervising the staff provided by the Complainant. In this respect, the Board found that the Complainant's evidence was compelling and that the Respondent's evidence was vague and tended to adapt to suit the allegations being made so as to excuse his conduct. The Board also found that the Respondent's evidence was inconsistent with the other facts that were before the Board. The Respondent was engaged to carry out and supervise restricted building work because the Complainant did not have the capacity to do it himself. That was evident on the facts before the Board and consistent with how the build was carried out during the Respondent's engagement.

[51] Further, even if the Respondent was not supervising (which is not accepted), the Board did not find the Respondent's position that he could not be held accountable for work that he worked on with others because the others were responsible. As a Licensed Building Practitioner, he had a duty to ensure that the work he was

involved in was completed to an acceptable standard, regardless of whether he did some or all of it. As such, the Board found that his negligence also extended to work that he carried out.

- [52] Also, the Board did not accept, as set out in the Respondent's record of work, that the Respondent was being supervised by an engineer. An engineer is deemed to be a Design Area of 3 and a Site Area of Practice 3 licence holder. A Design Licence holder cannot carry out or supervise restricted building work other than design work. A Site Licence holder cannot carry out or supervise any restricted building work.⁸
- [53] 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 Courts¹⁰.
- [54] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹¹. 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.
- [55] 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 Act¹². The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹³.
- [56] 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*

⁸ Refer clause 5 of the Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 and clause 4 of the Building (Designation of Building Work Licensing Classes) Order 2010.

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

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[57] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁴ and be carried out in accordance with a building consent¹⁵. 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.

[58] There was clear evidence before the Board of building work that did not meet acceptable standards as structural fixings, eco ply installation, and the installation of framing. The Board did not accept the submission that the work was not complete. In this respect, the Board considers that Licensed Building Practitioners should be aiming to get building work right the first time and not to rely on a Building Consent Authority or others to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing,¹⁶ 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.

[59] 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 legislation¹⁷:

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

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ Hansard volume 669: Page 16053

¹⁷ Hansard volume 669: Page 16053

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.

[60] 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:

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.*

[61] 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.

[62] Turning to supervision, the term supervise is defined in section 7¹⁸ of the Act. The definition states:

¹⁸ Section 7:

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

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

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

(a) is performed competently; and

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

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

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

(b) the experience of the person being supervised;

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

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

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

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

[65] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁹. The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

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

[66] Taking the above factors into account, the Board finds that the Respondent did not adequately supervise. He knew or ought to have known that he was the supervisor and rather than ensuring that those under his supervision were carrying out restricted building work to an acceptable standard, he chose to ignore his responsibilities and what was occurring on the site.

¹⁹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

[67] Finally, with regard to seriousness, in *Collie v Nursing Council of New Zealand*,²⁰ 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.

[68] The Respondent's failure to supervise was deliberate and serious, as was his failure to ensure that the building work was completed to an acceptable standard. Given that and the other factors discussed, 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.

Contrary to a Building Consent

[69] Turing to the finding under section 317(1)(d) of the Act, under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 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.*

[70] 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.

[71] 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

²⁰ [2001] NZAR 74

that building work under a building consent cannot continue if an amendment is applied for.

- [72] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used, then the building work can be said to have not been completed in accordance with the building consent. Unlike negligence contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established²¹.
- [73] Again, there was evidence that the building consent had not been complied with. it follows that the Respondent has committed that disciplinary offence. The Board does, however, note that there is a degree of commonality between this and the finding of negligence. As such, the Board will take this into consideration when it considers what the appropriate penalty should be.

Record of Work

- [74] 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 work²².
- [75] 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.
- [76] The Board discussed issues with regard to records of work in its decision C2-01170²³ 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.
- [77] 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.
- [78] 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*²⁴ “... the only relevant

²¹ *Blewman v Wilkinson* [1979] 2 NZLR 208

²² Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²³ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

²⁴ [2018] NZHC 1662 at para 50

precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

- [79] As to when completion will have occurred is a question of fact in each case.
- [80] 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.
- [81] In this matter, the Respondent noted his misunderstanding as to his obligations. That is not a defence. The record of work was not provided on completion, and the Board finds that the disciplinary offence has been committed.
- [82] 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.
- [83] In this instance, there was an ongoing dispute. Whilst not put forward as a reason, the Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [84] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Penalty, Costs and Publication

- [85] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [86] 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

- [87] 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*²⁵ 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.

- [88] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁶ 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.
- [89] The Board adopted a starting point of fine for the negligence and building consent findings. It noted the circumstances surrounding the matter, including that the Respondent may not have had an opportunity to address quality and compliance issues. The Board also took into account that the Respondent may, on a subjective basis, have considered he was not supervising. Given those factors, the Board decided that it would reduce the penalty to one of a censure. A censure is a public expression of disapproval. The Board hopes, with the issue of a censure, that the Respondent will amend his ways and take his obligations more seriously.
- [90] With regard to the record of work matter, whilst it is at the lower end of the disciplinary scale, the Board has adopted a starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There are no aggravating or mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

Costs

- [91] 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.”
- [92] 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 case²⁷.

²⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

²⁷ *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.

- [93] In *Collie v Nursing Council of New Zealand*,²⁸ 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.

- [94] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁹ 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.*

- [95] 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.

- [96] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a half-day hearing. It is less than 50% of actual costs.

Publication

- [97] 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 Act³⁰. 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.

- [98] 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

²⁸ [2001] NZAR 74

²⁹ CIV-2011-485-000227 8 August 2011

³⁰ Refer sections 298, 299 and 301 of the Act

of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[99] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³³. 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*³⁴.

[100] 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 interest³⁵. 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.

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

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured in respect of the findings under sections 317(1)(b) and (d) of the Act; and

Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500 in respect of the finding under sections 317(1)(da)(ii) of the Act.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

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

[103] 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.

³¹ Section 14 of the Act

³² Refer sections 200 and 202 of the Criminal Procedure Act

³³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁴ *ibid*

³⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

[104] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 September 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[105] 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

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

Signed and dated this 23rd day of August 2022



Mr M Orange
Presiding Member

ⁱ **Section 318 of the Act**

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

-
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

ii **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*