

## Before the Building Practitioners Board

	BPB Complaint No. CB25458
Licensed Building Practitioner:	Rajendra Krishna (the Respondent)
Licence Number:	BP 112034
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 Type:	In person
Hearing Location:	Auckland
Hearing Date:	13 April 2021
Decision Date:	19 April 2021

#### Board Members Present:

Mr M Orange, Deputy Chair, Legal Member (Presiding)  
Mr R Dunlop, Retired Professional Engineer  
Mr B Monteith, LBP, Carpentry and Site AOP 2  
Mr R Shao, LBP, Carpentry and Site AOP 1

#### 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.

#### Draft Disciplinary Finding:

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

## Contents

<b>Summary of the Board’s Decision</b> .....	2
<b>The Hearing</b> .....	2
<b>The Charges</b> .....	3
<b>Disciplinary Offences Under Consideration</b> .....	3
<b>Function of Disciplinary Action</b> .....	3
<b>Inquiry Process</b> .....	4
<b>Evidence</b> .....	4
Changes to the Foundation.....	6
Framing and Roofing Inspections.....	9
Record of Work .....	10
<b>Draft Conclusion and Reasoning</b> .....	10
Negligence and/or Incompetence .....	10
Contrary to a Building Consent – Building Consent Changes .....	12
Record of Work .....	13
<b>Penalty, Costs and Publication</b> .....	15
Penalty .....	15
Costs.....	16
Publication .....	17
<b>Section 318 Order</b> .....	18
<b>Submissions on Penalty, Costs and Publication</b> .....	18
<b>Right of Appeal</b> .....	19

### Summary of the Board’s Decision

- [1] The Respondent has carried out building work in a negligent manner, in a manner contrary to a building consent, and has failed to provide a record of work on completion of restricted building work. The Respondent is fined the sum of \$4,000 and ordered to pay costs of \$3,500. A summary of the matter will be published.

### The Hearing

- [2] The Board, on receiving a Registrar’s Report, reviewed the file and decided to deal with it by way of a Draft Decision.
- [3] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.

### **The Charges**

- [4] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> 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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); 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).

### **Disciplinary Offences Under Consideration**

- [5] On the basis of the Registrar's Report the conduct that the Board resolved to investigate was that the Respondent may have:
- (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).

### **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

---

<sup>1</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

- [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*<sup>4</sup> 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] 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.

### **Inquiry Process**

- [9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [10] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Evidence**

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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.
- [12] 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

---

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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.

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

Rajendra Krishna	Respondent
[Omitted]	Complainant
[Omitted]	Engineer

- [14] The Board provided an interpreter for the Respondent.
- [15] The Respondent was engaged to carry out building work on an alteration and addition to an existing dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The building consent was issued on 29 March 2018. The Respondent's building work came to an end on or about 23 September 2019 when the Respondent's contract for services was terminated. A record of work dated 20 January 2020 was provided as part of the investigation and after a complaint had been made about its non-provision. It was obtained from the building consent file held by the Council.
- [16] The record of work identified that the Respondent had carried out the following restricted building work: Foundations and subfloor framing; Walls; Roof; Columns and beams; Bracing; Damp proofing. Details of the specific work carried out were noted on the record of work.
- [17] The Complainant alleged that there were repeated failed foundation inspections and that the Respondent continued to carry out building work beyond the foundations, notwithstanding the failed inspections in that the frames and roof were installed. The Complainant also alleged that the Respondent cut two windows on one wall and installed new windows when an engineer had advised the wall needed to be demolished and that waterproofing was not carried out resulting in water seepage. The Complainant stated:

*Only underslab plumbing work was passed and foundation was failed 3 times. He placed the timber frame and roof on the foundation which hasn't been passed by the Council inspectors. There was no record of work given to me and no inspection booklet left. The excavation work was not done properly and the foundation soil was left on the property with other rubbish from demolition job. Water proofing was not done. The water is still coming inside the building.*

- [18] The Complainant provided supporting photographs of the matters complained about. The photographs also depicted a site that had a number of health and safety hazards and accumulated rubbish. The Complainant stated that the Respondent abandoned the job.

- [19] The Board was also provided with copies of the engineer's site visit records. A Site Visit Record dated 2 February 2019 noted:
- *Builder has not removed existing wall as per plan and has excavated retaining wall footing 400mm to the inside face. Therefore the existing retaining wall will remain, with the new wall in front.*
  - *The new retaining wall and details need to be updated on the plans.*
  - *The building has been propped adjacent to the cut areas and the cut currently looks stable with the dry weather.*
  - ***However, it is recommended that the proposed new wall be constructed as soon as possible to minimise/eliminate risk from the open cut.***
  - ***Geotech engineer to inspect the site also and advise.***

- [20] A Site Visit Record dated 4 March 2019 noted:
1. *The soil underneath existing footing is not stable. Need action as soon as possible.*
  2. *The Ex Footing will fail if the underneath soil is not stabilised immediately.*

[21] The same or similar observations were made in two subsequent site visits.

[22] The site visit records formed part of the Council's building consent documentation. It was noted that the Council file provided to the Board did not contain any Council inspections. The building consent issued required that inspections be carried out at various points in the build. It was not clear if any Council inspections had been carried out but the Complainant has inferred that inspections had occurred.

[23] The Respondent was provided with the complaint and was invited to provide a response. He did not do so. Following the issue of the Board's Draft Decision, the Respondent provided a detailed response. It was as a result of that response that an in-person hearing was scheduled.

#### Changes to the Foundation

[24] The building consent issued specified the foundations for a garage conversion. The Engineer gave evidence that the foundation had been designed so as to create the maximum amount of internal useable space in the area to be converted.

[25] The Respondent gave evidence that, at the commencement of the build, he and his [Omitted] discussed the foundation methodology and decided on an alternative method. The alternative method involved leaving the existing foundation in place, as opposed to removing it as per the building consent, and building an additional foundation tied into the existing foundation outside the existing foundation.

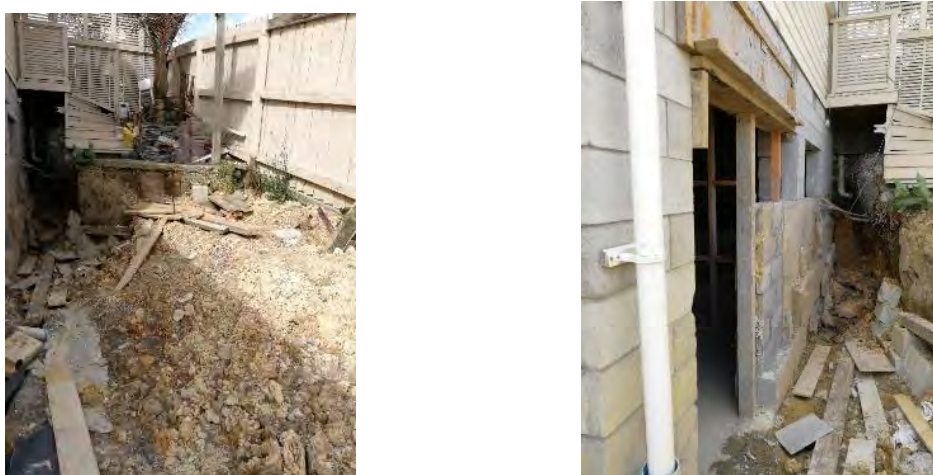
[26] The following pictures depict the solution that was utilised:



[27] The Respondent proceeded to prepare for the changed method by excavating and preparing footings. The Engineer gave evidence that after excavation work for the alternative method had been made, he attended the site and the alternative method was discussed. It was also discussed with the Complainant, who stated that he agreed to it after speaking to the Engineer, noting that it was a cheaper option. The Engineer stated that the change resulted in approximately 600mm less useable space in the converted area. No discussions were held with the Engineer, designer or Building Consent Authority (BCA) prior to the excavation work being carried out.

[28] An amendment to the building consent was sought. Building work on the foundation stopped whilst the amendment was processed. It was subsequently granted, and the building work in relation to it then progressed. The Engineer gave evidence that he was satisfied that the building work on the foundation was carried out in a compliant manner and that he was willing to certify the same to the BCA. The BCA required that certification as it had not inspected the foundations during construction.

[29] In the period between the excavations and the building consent being granted, the cut faces of the excavations were exposed. This led to the concerns about soil stability and erosion noted above in the Engineer's site observations. The following pictures show the exposed areas that were of concern:



- [30] The Engineer gave evidence that stabilisation was completed after the 4 March site visit by way of propping.
- [31] It was noted by the Complainant and the Engineer that waterproofing had not been completed behind the new foundation block walls that had been constructed and that the gap between the new walls and the existing foundation was insufficient to allow waterproofing to be completed. The Complainant stated that an amendment to the building consent was being sought to allow for a different waterproofing method. The Respondent stated that waterproofing had not occurred because of weather issues, that his [Omitted] had a person who was going to complete the work and that the application of a membrane was feasible, notwithstanding the limited access space. He was not able to elaborate on how it would be done.
- [32] Notwithstanding the evidence provided at the hearing, the Respondent, in his written response to the Draft Decision, stated the following:

*At the excavation time, accordingly, we had to excavate according to the plan. That was the area under the lounge and the garage area . But owner met with the Architect and designed this plan that apparently would get approved on-site as minor variation, (attached in the attachment and highlighted on the plan).*

*What nobody considered that after excavation of this area, there will be waterproofing problem, the structural integrity of the foundation will be compromised.*

*Excavation was done, disaster strikes, Engineer called in and difficulty for us. The main problem that became problem was waterproofing the area because this area was a confined space*

*We carried on with work because the work was such that could not be left behind. Footing work done, slab work done and pre-line plumbing completed. To book an inspection we had to wait week and a half to get one.*

*The Underslab inspection passed.*

*The slab inspection was done but council was not keen to do inspection before a plan is put in place how to control the soil. A Geotech report and Engineer report was given to Boris (council team leader) and waiver given in the email to engage the engineer and get the soil stabilised to avoid any future disaster. We were allowed to fill the block wall and slab.*

And

### ***Waterproofing***

*We approached owner many times to remove the deck area to access the block-wall. Also the area underneath the garage area was a confined space as*

*it was impossible to approach it because of limited space. The water proofer had two major problems:*

*1. CONFINED SPACE*

*2. WATER COMING THROUGH AND THE BLOCK IS WET AS THIS WILL LEAD THE BUTYNILE MEMBRANE TO FAIL.*

- [33] The Respondent also provided email correspondence in relation to the changes to the foundation. They were not legible. He was asked to provide readable versions. New versions which were in a different format from the original were provided. It was not clear who they were from or to. They were truncated and were not in a normal email format. They did refer to work that had already been carried out.

### Framing and Roofing Inspections

- [34] The Respondent stated that he continued with and completed the installation of wall framing, building wrap, roof trusses and roofing cladding without calling for the required BCA inspections as he was weatherproofing the dwelling against the elements. The following picture shows the extent of the work and the condition of the building site.



- [35] The Respondent stated that the work had to be progressed as a matter of urgency as a result of impending weather. Again, in his written response, the Respondent stated:

*Awaiting the winter to ease and block wall to waterproof, we carried on work because a lot of time and money had been put into project and client was pushing hard to achieve the target date given to finish the job.*

*We carried on with work framing external, mid floor area, and roof trusses and roof area by [Omitted]. We wrapped the build to avoid any water through because the family was still living in the house.*

## Record of Work

[36] The Respondent was asked why he had not provided a record of work when the contract was terminated. He stated he could not remember why.

## **Draft Conclusion and Reasoning**

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

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

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

## Negligence and/or Incompetence

[39] 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*<sup>6</sup> test of negligence which has been adopted by the New Zealand Courts<sup>7</sup>.

[40] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>8</sup>. 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.

[41] 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<sup>9</sup>. 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

---

<sup>6</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>7</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *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<sup>10</sup>.

[42] 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.*

[43] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>11</sup> and be carried out in accordance with a building consent<sup>12</sup>. 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.

[44] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>13</sup>, 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.*

[45] When the Board made its Draft Decision it decided, in the absence of a response from the Respondent, that building work had been carried out without an amendment to the building consent being sought. The evidence at the hearing was that an amendment was sought and subsequently approved but only after building work on the change had commenced. The issues the new evidence raised was that

---

<sup>10</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>11</sup> Section 17 of the Building Act 2004

<sup>12</sup> Section 40(1) of the Building Act 2004

<sup>13</sup> [2001] NZAR 74

the change to the foundation was progressed prior to any consultation with the owner, the designer, the engineer or the BCA.

- [46] The Respondent had a duty, if the building work was going to be changed from that which was approved in the building consent, to consult with the designer, the engineer and/or the building consent authority prior to carrying out any building work associated with it. The Respondent did not do that. Rather he made a decision to change and started working on it without consultation. In failing to do so and failing to consult the Respondent has departed from what the Board considers to be an accepted standard of conduct and has been negligent.
- [47] The Respondent was negligent when he failed to accommodate for damp proofing as the building work progressed. The Board did not accept that it would still have been possible to install a damp proof membrane as per the building consent with the limited access available to apply the membrane.

#### Contrary to a Building Consent – Building Consent Changes

[48] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).

[49] All building work must also be carried out in accordance with a building consent. 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.

[50] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

**49 Grant of building consent**

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

[51] 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 as set out in section 3.

[52] In *Tan v Auckland Council*<sup>14</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

*[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

[53] The same applies to the ongoing verification of building work. Justice Brewer in *Tan* also noted:

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[54] The building consent clearly set out the inspections that were required and the sequence in which they were to be called. The inspections schedule forms part of the building consent. Notwithstanding the clear requirements, the Respondent did not call for inspections. This was particularly concerning with regard to framing, building wrap, trusses and roofing.

[55] The Respondent, when he failed to call for the required inspections as the work progressed, did not build in accordance with the building consent.

#### Record of Work

[56] 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<sup>15</sup>.

[57] 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.

[58] The Board discussed issues with regard to records of work in its decision C2-01170<sup>16</sup> and gave guidelines to the profession as to who must provide a record of work, what

---

<sup>14</sup> [2015] NZHC 3299 [18 December 2015]

<sup>15</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>16</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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.

- [59] 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.
- [60] 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*<sup>17</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [61] As to when completion will have occurred is a question of fact in each case.
- [62] 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 January 2020. A record of work was not provided to the owner. One was provided to the Territorial Authority. It is dated 20 January 2020. It is not clear when it was provided. What is clear is that the owner was not provided with a record of work. 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.
- [63] 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. The Respondent was not able to provide any reasons or any good reasons for the delay.
- [64] In this instance, the Board does note that there was an ongoing commercial dispute. 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.
- [65] 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

---

<sup>17</sup> [2018] NZHC 1662 at para 50

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**

[66] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[67] 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

[68] 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*<sup>18</sup> 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.*

[69] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>19</sup>. The High Court, when discussing penalty, stated:

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

---

<sup>18</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>19</sup> [2012] NZAR 481

- [70] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime. Suspension is a somewhat lesser sanction.
- [71] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>20</sup> 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 starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [72] The Board, in its Draft Decision, considered suspension was required. The Board has decided, having heard further evidence, that a lesser penalty is appropriate. Notwithstanding, the Board wants to make it clear that the offending is still serious and that a significant penalty is required.
- [73] The Respondent's approach to the original complaint and the hearing is an aggravating feature. In *Daniels v Complaints Committee*<sup>21</sup> the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst not belligerent, the Respondent did not engage in the process until after a Draft Decision had been issued.
- [74] The Board also notes, as an aggravating factor, that the Respondent has previously appeared before the Board on a record of work matter under section 317(1)(da)(ii) of the Act. In 2018 the Board found that the respondent had failed to provide a record of work on completion of restricted building work. He was fined \$1,500 and ordered to pay costs of \$500. The matter was dealt with on the papers.
- [75] There are no mitigating factors, other than a commercial dispute which was largely of the Respondent's own making.
- [76] Taking all of the above factors into account, the Board considers that a fine is the correct form of penalty. The maximum fine the Board can impose is \$10,000. The fine needs to be set at an amount that deters others and which takes into account the seriousness of the matter and the aggravating factors present. In this instance, it considers a fine of \$4,000, which is in the mid-range, is appropriate. The fine covers all of the disciplinary offending the Respondent has committed.

### Costs

- [77] 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."
- [78] 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

---

<sup>20</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>21</sup> [2011] 3 NZLR 850.

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>22</sup>.

- [79] In *Collie v Nursing Council of New Zealand*<sup>23</sup> 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.*

- [80] The Board notes the matter was dealt with at an in-person hearing. Based on that and 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.

### Publication

- [81] 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<sup>24</sup>. 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.*

- [82] 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.
- [83] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>25</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>26</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>27</sup>. 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*<sup>28</sup>.

---

<sup>22</sup> *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.

<sup>23</sup> [2001] NZAR 74

<sup>24</sup> Refer sections 298, 299 and 301 of the Act

<sup>25</sup> Section 14 of the Act

<sup>26</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>27</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>28</sup> *ibid*

- [84] 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<sup>29</sup>. 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.
- [85] Based on the above, the Board will order further publication. The Board considers that it is important that others are made aware of the Respondent's conduct and that they learn from it.

### **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(f) of the Act, the Respondent's is ordered to pay a fine of \$4,000.

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

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

**In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.**

- [87] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### **Submissions on Penalty, Costs and Publication**

- [88] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 24 May 2021. 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.
- [89] 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.


---

<sup>29</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

## Right of Appeal

[90] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 3<sup>rd</sup> day of May 2021



**Mr M Orange**  
Presiding Member

---

### <sup>i</sup> **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."*

### <sup>ii</sup> **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.*