

Before the Building Practitioners Board

	BPB Complaint No. CB25399
Licensed Building Practitioner:	Avinash Kumar (the Respondent)
Licence Number:	BP 131614
Licence(s) Held:	Carpentry, Bricklaying and Blocklaying – Structural Masonry

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	Auckland
Hearing Type:	In Person
Hearing Date:	4 November 2020
Decision Date:	23 November 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
David Fabish, LBP, Carpentry and Site AOP 2
Rob 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.

Disciplinary Finding:

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

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Summary of the Board’s Decision

[1] The Respondent has supervised building work in a negligent manner and has failed to provide a record of work. He has not carried out building work contrary to a building consent. The Respondent is ordered to pay a fine of \$4,000 and to pay costs of \$3,500.

The Charges

[2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ 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 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

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

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

[3] The matters to be further investigated under sections 317(1)(b) and 317(1)(d) of the Act include the issues raised in the reports from August Millard Building Consultants and Maynard Marks Property and Building Consultants.

Function of Disciplinary Action

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

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

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

[6] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

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

[7] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

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

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 committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [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 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 it heard evidence at the hearing from:

Avinesh Kumar	Respondent
<i>[Omitted]</i>	KB Projects Limited
<i>[Omitted]</i>	Registered Building Surveyor
<i>[Omitted]</i>	Registered Building Surveyor

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

- [14] The Respondent was engaged to both carry out and supervise building work on a new residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion.
- [15] The Respondent carried out blockwork as a subcontractor to KB Projects Limited. He provided a record of work dated 28 September 2020 for: foundation blockwork, basement retaining walls blockwork and columns and beams.
- [16] The Respondent was also engaged by KB Projects to supervise restricted building work on other aspects of the build. His record of work for supervision dated 28 September 2020 covered: walls – erect all frames and rafters in roof; roof – rafters as per S112; columns and beams – steel beam install in midfloor Sheet S110 except (unreadable) beam, bracing – all bracing as per plan; other – deck framing and furring strips ready for membrane; ventilation – timber weatherboard battens, horizontal cavity battens for NuWall substrate and for craftstone; wall cladding or wall cladding system – timber weatherboards, NuWall installation.
- [17] The Respondent also gave evidence at the hearing that he carried out and supervised the construction of a deck.
- [18] The Respondent’s building work and supervision took place between May 2017 and August 2019. KB’s contract for the building work was cancelled in April 2020. The Respondent noted contractual issues that followed the cancellation between the principle parties to the contract, but stated that the delay in providing the record of work was not as a result of any instructions by his head contractor not to provide it.
- [19] The work supervised did not include the foundations, other than blockwork or the membrane application to a deck. Both were supervised by different Licensed Building Practitioners⁷. The Board’s inquiry did not further investigate allegations about the foundations or deck membrane. It did further investigate the blockwork and the substrate for the membrane.
- [20] The Respondent’s supervision arrangement with KB Projects was that KB would provide the labour, and the Respondent would act as the supervising Licensed Building Practitioner for the restricted building work (structural and weathertightness elements). The Respondent contracted to KB on an hourly basis.
- [21] The build progressed but, due to observed on-site issues, August Millard was engaged to carry out a review of what had been completed and to oversee completion. *[Omitted]* who was, at the time employed by August Millard, attended the site on 19 November 2018 and he produced a report dated 22 November 2018 which itemised 27 items that required attention. Included were issues with the cladding, decking, and windows and with the columns that had been built by the Respondent. His report noted:

⁷ The Board received records of work from the Licensed Building Practitioner who had supervised the restricted building work related foundations and the deck membrane.

Ground Floor:

1. *There is water damaged timber framing in the laundry and bathroom areas. Moisture content readings of 23% and 36% were recorded at 2 separate locations. Two timber samples were removed for analysis. Refer to Appendix A - photograph 1.*
2. *Water was observed on the floor and the DPC between the timber bottom plate and the concrete slab along the outside wall of Bedroom 2. Refer to Appendix A - photograph 2.*
3. *There are cracks in the mortar of the concrete masonry wall at various locations around the building. The mortar needs to be scraped out and new mortar installed. Refer to Appendix A – photographs 3,4 and 5.*

First Floor:

4. *Jamb liners of various widths have been installed to the commercial grade joinery in the entry foyer, with the wall board lining not fitting into the rebates provided. These need to be removed, air seals checked by August Millard and new jamb liners cut to fit and installed. Refer to Appendix A – photographs 6, 7,8 and 9.*

Second Floor:

5. *The windows in the two smaller bedrooms and the bathroom along the east elevation are not installed in the correct position within the framed openings. Windows need to be removed and flashings around openings replaced with new. Windows to be re-installed and seated hard against the window flashings. Refer to Appendix A - photographs 10-13.*

External Defects:

6. *Large cracks to all the concrete masonry columns on the east elevation of the building. KB Projects to provide Structural Engineers site inspection report for these columns. Refer to Appendix A – photographs 14-16.*
7. *Timber scribes to windows and doors have been over cut. These need to be removed and cut correctly. Refer to Appendix A – photographs 17 and 18.*
8. *The detail at the top of the masonry columns has changed and there is a lack of flashing. Further investigation required. Builder required to provide access to top of columns and undo existing works. Refer to Appendix A – photograph 19.*
9. *Where a soffit exists under Nu-wall vertical cladding, the cavity has been blocked off. The soffit needs to be removed and the appropriate*

flashing installed to allow the cavity to drain. Refer to Appendix A – photographs 20 and 21.

10. *Balcony gradient is less than approved consented drawings and, in some cases, less than the manufacturers requirements. KB Projects to provide membrane manufacturers literature to support falls. Refer to Appendix A – photographs 22-29.*
11. *The roof drip edge flashing extends forward at a shallow angle into the gutter rather than at 90 degrees to the roof substrate.*
12. *Roof water is not being controlled causing the site to be very wet resulting in some site erosion to the east of the site. Refer to Appendix A – photographs 30 and 31.*
13. *The grooved fibre cement soffit lining does not run parallel with the building line. Refer to Appendix A – photographs 32 and 33*
14. *A stepped soffit flashing has been installed to the raking soffits. This should be a timber scribe cut over weatherboards. Refer to Appendix A - photograph 34.*
15. *The ends of the cedar soffit lining do not align with the flashing. Refer to Appendix A - photograph 35.*
16. *There are numerous damaged or poorly installed window and base of wall flashings. Refer to Appendix A – photographs 36-43.*
17. *Exposed plastic flashings at roof/wall junctions. Refer to Appendix A – photographs 44-46.*
18. *There is no rebate in the concrete floor slab for the garage door. Refer to Appendix A – photographs 47 and 48. (Not further investigated)*
19. *The cavity is open to vermin ingress at the base of the garage door. Refer to Appendix A – photographs 47 and 48.*

General Comments:

20. *KB Projects to ensure the Council approved Building Consent documents including all Minor Variations remain on site at all times.*
21. *KB Projects to provide a copy of the approved Auckland Council Minor Variation for cladding system change from JSC vertical shiplap timber to Nu-wall aluminium cladding system.*
22. *KB Projects to provide Minor Variation for the substitution of Nuraply 3P double layer membrane to the balconies for another product. In addition, a letter from the manufacturer of the product will be required in respect of non-compliant falls and confirming all warranties are in place.*

23. *KB Projects to provide communications between Nu-Wall and themselves regarding window flashing issues.*
24. *The internal stair structure has no fall protection and is unsafe.*
25. *The balcony to level 2 has no fall protection and is unsafe.*
26. *The scaffold has been tagged as unsafe.*
27. *The site is generally untidy making it difficult to move about efficiently and safely.*

[22] The exterior cladding manufacturer also provided a report based on a site inspection dated 13 November 2018. The following items requiring attention were noted:

Wall Section A

*A1, Distorted / bent window flashings A2, Damaged board – LH window Jamb
A3, Loose RH edge flashing*

A4, No flashing around intersecting Roof/facia A5, LH corner flashing not fitted flush.

Wall Section B

B1, Window 15mm+ off flashing face

B2, Distorted/bent soffit Reverse Eave flashing

B3, Interstory joint not coated and rough overlap connection B4, Scratched boards and bootprints

B5, No flashing around intersecting Roof/facia B6, board interconnection misaligned

Wall Section C

C1, Window flashings not flush on cladding C2, varnish splashes on cladding

C3, Misaligned corner base mitre C4, Damaged Base profile

Wall Section D (no close inspection as scaffolding removed)

D1, Missing cap flashing

D2, Missing Facia Flashing

D3, Intersecting roof/facia not flashed

D4, corners appear misaligned with boards

General comment

The selected Nu-Wall system required post fitting of windows sequenced after the cladding has been installed.

The builders fixed the windows prior to the cladding and then requested the Nu-Wall pre-fixed window flashing system to be supplied.

This system requires that the windows be fitted 18-20mm off the cavity batten face. This was not achieved and consequently a tight window fin to Nu-Wall window face flashing connection has not been achieved and window waterproofing has not been achieved.

I have observed that the windows have been fitted with a variety of seating depths which make it impossible to achieve a watertight cladding face connection.

Recommendation

The Nu-Wall cladding needs to be removed and reinstalled. Some boards and flashings will require replacement, however most are reusable.

The windows need to be reset (consistent set depth). Flashings need to be installed around all roof/wall intersections

- [23] The Respondent provided a written response to the complaint dated 15 December 2019. In it he noted:

It is important to note that we work to KB Projects instructions and are not allowed on any sites without their permission.

- [24] The Respondent gave evidence as regards his supervision at the hearing. He stated he had two other simple jobs on at the time and that most of his time was spent on [Omitted]. He stated that he determined the level of supervision of the building work on the capability of those being supervised and that if they were more advanced in their capabilities, then less supervision would be provided. He noted that he was on-site approximately every two days. When on site he stated he would check the building work completed against the plans.

- [25] The Respondent noted in his response that water damage issues noted in the August Millard report related to the membrane installation. At the hearing, he accepted that he supervised the installation of a polystyrene protective overlay and the installation of pipes at the base of the wall. It was noted that the drain outlets were higher than the drain coil and that there was a high volume of water draining down the hill above it. This resulted in about a half metre of water accumulating behind the wall. As a result of this and tanking issues, water ingress resulted.

- [26] With respect to the cladding, evidence was heard that the cladding was changed and that the Respondent was not familiar with the product. The KB Projects staff who installed the product were familiar with bevel back weatherboards but not with the Nu Wall system. He asked Nu Wall, the manufacturer, to supervise the install as he was not familiar with the product, but they were not able to. He reluctantly undertook the supervision. He carried out limited investigations as to the products installation requirements prior to undertaking his supervision.

- [27] As noted by Nu Wall, the cladding was installed in an incorrect sequence. This resulted in the issues noted in the August Millard, and Nu Wall reports. In essence, accommodations were made to allow for the out of sequence building work, and these resulted in issues with window joinery. The Respondent noted that he was happy to attend to remediation.
- [28] The Respondent was questioned as to why he had not identified issues with window alignment, which were obvious to the naked eye. He was not able to provide a reason why. He was also asked what checks he had carried out of the framing which was noted as being out of plumb. He stated he checked the overhang and made spot checks with a 1.8 metre level. He did not identify any issues.
- [29] With respect to a cavity closer where a soffit met cladding which had not been installed, it was noted that without it there was no drainage path and that the soffit and cladding had to be removed to for the install of the cavity closer. The Respondent accepted the work was not as per the plans.
- [30] The falls in the deck, which were noted as being less than what was specified, were accepted by the building consent authority and a product warranty was provided.
- [31] With respect to the columns, the Respondent provided an engineer's opinion that the columns were, notwithstanding visible cracking, acceptable. Evidence was heard that cracking might not mean that the structural integrity of the columns was at risk. Evidence was also heard that the cracks grew over time and that the engineer recommended that the top of the columns be removed and rebuilt. In doing so, it was ascertained that the reinforcing steel had not been installed as per the engineer's specifications. The Respondent stated that he had placed the steel. He noted that it was a small cavity and that there was little room to place the steel. He did not raise the issue with the engineer. It was noted that the remedial builder was able to place the steel correctly.
- [32] The Respondent made a closing submission that he had learnt a lot from the job and he would approach a job such as the one undertaken in a different manner in the future.

Board's Conclusion and Reasoning

- [33] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
 - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);
- and **should** be disciplined.

[34] The Board has also decided that the Respondent **has not** 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);

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

Negligence and/or Incompetence

[36] 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.

[37] The finding of negligence relates to the Respondent's supervision of non-licensed persons and to the manner in which he carried out building work on columns.

[38] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.

[39] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹⁰. 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.

[40] 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 Act¹¹. 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 practitioner¹².

[41] 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—*

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁰ *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 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[42] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[43] The building work that did not meet acceptable standards was the installation of the wall cladding and windows and the completion of the columns. There was clear evidence that the building work had not been completed in a competent or compliant manner. The cladding was installed out of sequence and not in accordance with the manufacturer's instructions. Significant downstream issues resulted, especially with the window joinery. The columns did not have the correct steel placement.

[44] The Respondent carried out the work on the columns, and he is directly responsible for it. He supervised the wall cladding. Supervise is defined in section 7¹⁵ of the Act. The definition states:

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.*

[45] In C2-01143 the Board also discussed the levels of supervision it considers will 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:

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ 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.*

- (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.

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

[47] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁶. 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.”

[48] The persons who installed the cladding, who were working under the Respondent's supervision, were not familiar with the product, neither was the Respondent. The Respondent did not familiarise himself with the product or the methodology for its install. He did not ensure that those who carried out the installation knew what was required. He did not identify that the work being undertaken was non-compliant and/or defective.

[49] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

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

¹⁶ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

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.*

- [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.
- [52] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.
- [53] 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 form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence must be established¹⁷. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.
- [54] The Board has decided that whilst there were elements of the build that were not as per the building consent it has made a decision that the Respondent was negligent in respect of those matters and that a further finding of contrary to a building consent is not, in the circumstances of this matter, required. The Respondent is, however, cautioned that care should be taken in the future to ensure building work is completed in strict compliance with the building consent.

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

Record of Work

- [55] 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 work¹⁸.
- [56] 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.
- [57] The Board discussed issues with regard to records of work in its decision C2-01170¹⁹ 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.
- [58] 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.
- [59] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*²⁰ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [60] As to when completion will have occurred is a question of fact in each case.
- [61] 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 April 2019 when the building agreement came to an end. A record of work was then due but was not provided until after a complaint had been made and as part of the complaint investigation process. 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.
- [62] 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

¹⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

²⁰ [2018] NZHC 1662 at para 50

case will be decided by the Board on its own merits, but the threshold for a good reason is high.

- [63] In this instance, there was an ongoing dispute. Whilst the Respondent was not a party to it 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.
- [64] 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

- [65] 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.
- [66] 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

- [67] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*²¹ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [68] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²² the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a

²¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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

- [69] The degree of negligence was at the higher end. The Board adopted a starting point based on the degree of negligence of \$4,500. The starting point recognises that the Respondent failed in his duties as a supervisor and in his obligations as a Licensed Building Practitioner when carrying out building work. Additionally, it takes into account the failure to provide a record of work. The Board considers the sum creates a deterrence to others from similar behaviour.
- [70] There are some limited mitigating factors. The Respondent's acknowledgement that he could have done better and his recognition that he has learnt from the matter have been taken into account. The Board has, having taken those factors into account, reduced the fine by \$500. The fine is set at \$4,000.

Costs

- [71] 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."
- [72] 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 case²³.
- [73] In *Collie v Nursing Council of New Zealand*²⁴ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [74] 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 costs for a half-day in-person hearing. It is significantly less than 50% of actual costs.

Publication

- [75] 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 Act²⁵. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

²³ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

²⁴ [2001] NZAR 74

²⁵ Refer sections 298, 299 and 301 of the Act

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.

- [76] 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.
- [77] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁸. 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*²⁹.
- [78] 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 interest³⁰. 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.
- [79] Based on the above, the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$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(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.

- [81] 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.

²⁶ Section 14 of the Act

²⁷ Refer sections 200 and 202 of the Criminal Procedure Act

²⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁹ *ibid*

³⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

- [82] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **22 December 2020**. 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.
- [83] 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

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

Signed and dated this 1st day of December 2020


Chris Preston
 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).*

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- (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.*