

Before the Building Practitioners Board

	BPB Complaint No. CB26040
Licensed Building Practitioner:	Viliami Langi (the Respondent)
Licence Number:	BP 133668
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	10 March 2023

Board Members Present:

- Mr M Orange, Chair, Barrister (Presiding)
- Mr D Fabish, LBP, Carpentry and Site AoP 2
- Mrs J Clark, Barrister and Solicitor, Legal Member
- Ms K Reynolds, Construction Manager

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 a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$1,000 and ordered to pay costs of \$1,000. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

The Respondent **has not** committed disciplinary offences under sections 317(1)(b) and (d) of the Act.

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Summary

- [1] The homeowners made a complaint about the workmanship on their new two-storey dwelling. The Respondent was subcontracted to [OMITTED] to carry out and supervise carpentry work on the project. Mr [OMITTED], a Licensed Building Practitioner and director of that company, also supervised some of the building work.
- [2] The issues before the Board were whether the Respondent had carried out or supervised building work in a negligent or incompetent manner or in a manner that was contrary to the building consent. Also at issue was whether a record of work had been provided on completion of restricted building work.
- [3] A Council site inspection report set out the instances of unsatisfactory building work and building work which was not in accordance with the building consent and they were the focus of the Board’s investigation. This decision sets out that whilst on this project, there were workmanship issues and work which was not in accordance with

the building consent, Mr [OMITTED] was responsible for the supervision of that work.

- [4] The Respondent did not provide a record of work to the Complainant or the Territorial Authority. He provided it to the main contractor. The question for the Board was whether the Respondent had failed to provide a record of work on the completion of restricted building work. There were two issues that had to be determined. Firstly, was the Respondent's restricted building work complete, and, secondly, if it was, did the provision of the record of work to the main contractor constitute a good reason not to provide a record of work. The Board found that the Respondent's restricted building work was complete and that provision of the record of work to the main contractor did not fulfil his statutory obligations and therefore was not a good reason to withhold the record of work.
- [5] The Board decided, with respect to the failure to provide a record of work, that the Respondent would be fined \$1,000 and ordered to pay costs of \$1,000. The penalty was reduced on the basis that there were mitigating factors. The costs were reduced on the basis that the Respondent was partially successful in his defence of the charges.

The Charges

- [6] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [7] The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to call and question witnesses to further investigate aspects of the evidence.
- [8] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland, have:
- (a) carried out or supervised building work in a negligent or incompetent manner. (Section 317(1)(b) of the Act);
 - (b) carried out or supervised building work that does not comply with a building consent. (Section 317(1)(d) of the Act); and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he has supervised, to provide the owner and the

¹ 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

Territorial Authority with a record of work, on completion of the restricted building work (Section 317(1)(da)(ii) of the Act).

- [9] The issues raised in the Council site inspection report of 2 October 2020 formed the basis of the Board's inquiry into the Respondent's conduct.
- [10] This matter proceeded as a consolidated hearing with two other Licensed Building Practitioners ([OMITTED] CB25518 and [OMITTED] CB26038) involved in the same project, facing the same grounds of discipline. Separate decisions have been issued in respect of each of them.

The Respondent's Role

- [11] The Respondent provided a record of work to the main contractor which indicated that he had carried out the ribraft foundation, wall framing, roof trusses, deck framing and ply and beams, bracing, damp proofing, ventilation system, wall cladding, and waterproofing.
- [12] The record of work does not indicate that the Respondent undertook any supervision of the work. However, at the hearing, Mr Langi explained that he was on site every day and that he ran the job giving instructions and supervising approximately three or four workers, of whom two were qualified but non-licensed builders. On the basis of this evidence, the Board finds that Mr Langi was both carrying out and supervising the building work.
- [13] The Respondent further clarified at the hearing that he had left the site after he had done the framing (Mr [OMITTED] agreed) and acknowledged that his record of work was, therefore, in some respects incorrect.

Negligence or Incompetence

- [14] The Board focussed its questioning on four aspects of the building work which were identified in the Council site inspection report (the brick shelf angles, water runoff for the deck, window flashings with no end caps installed and the welding of the garage lintel).
- [15] The Board found on the evidence before it that the building work being investigated was neither carried out nor supervised by the Respondent. It was carried out by other non-licensed workers and supervised by either Mr [OMITTED] or Mr [OMITTED], both of whom are Licensed Building Practitioners³.
- [16] The Board notes that there was one aspect of the work (which the Board has found was negligently supervised)⁴ that the Respondent did have some involvement in. The Respondent framed the deck and installed the ply substrate. This is relevant to the issue of the water runoff from the deck.

³ LBP decision CB 25518

⁴ LBP decision CB 25518

- [17] Mr Henry, a Building Control Officer from the Auckland City Council, stated that there was no diverter installed around the timber-framed and schist-clad column on the first-floor deck. This left water able to run into the cavity and was not in accordance with E2 of the building code. Mr [OMITTED] gave evidence that it was the waterproofing subcontractor who should have installed upstands and kickouts to avoid this issue. Mr [OMITTED] agreed that he had supervised this work.
- [18] On the basis of the evidence from Mr [OMITTED], the Board finds that even though the Respondent framed the deck, he was not responsible for the water diversion around the timber-clad column.
- [19] Having found that the Respondent did not carry out or supervise the building work, which is the subject matter of this investigation, it is unnecessary to determine the issues of whether the Respondent's conduct was of an acceptable standard or reached the threshold of seriousness necessary to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent

- [20] The Respondent has not committed the disciplinary offence of carrying out or supervising building work in a negligent or incompetent manner under section 317(1)(b) of the Act.

Contrary to a Building Consent

- [21] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.⁵ The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.⁶ If it does not, then a disciplinary finding cannot be made.
- [22] The installation of the brick shelf angles and the non-diversion of the water around the timber column on the deck was work that differed from the building consent. The Respondent did not carry out or supervise these items of building work. It is, therefore, not necessary for the Board to determine, in respect of the Respondent, whether the departures from the building consent were serious enough to warrant a disciplinary finding.

⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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".

Has the Respondent supervised building work contrary to a building consent

- [23] The Respondent has not committed the disciplinary offence under section 317(1)(d) of the Act.

Failure to Provide a Record of Work

- [24] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.⁷
- [25] 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 work⁸ unless there is a good reason for it not to be provided.⁹

Did the Respondent carry out or supervise restricted building work

- [26] The Respondent, through the record of work he completed, acknowledged he had carried out restricted building work. Based on the evidence he gave at the hearing, he also supervised restricted building work, which was not acknowledged on the record of work. He stated that the record of work was in some respects incorrect as he had left the site before some of the work, which he indicated he had carried out, was actually done.
- [27] However, there is no dispute that he was involved up to and including the framing of the dwelling and, therefore, had carried out restricted building work.

Was the restricted building work complete

- [28] The Respondent completed his work and left the site. The date of his departure from site was not given in evidence, but his record of work is dated 28 February 2020, so the Board finds that this was the latest date his restricted building work was complete.

Has the Respondent provided a record of work

- [29] The Respondent acknowledged that he had not provided a record of work to the homeowners or to the Council. He provided a record of work dated 28 February 2020 to Mr [OMITTED], as a director of the main contractor. The Respondent said that this was his standard practice.
- [30] Provision of the record of work to the main contractor does not fulfil the Licensed Building Practitioner's statutory obligations. The Respondent should note that whilst it may be common practice for some Licensed Building Practitioners to provide their record of work to a main or head contractor, it is a practice that comes with a degree of risk as the main or head contractor may not pass it on. As such, Licensed Building

⁷ Section 88(1) of the Act.

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁹ Section 317(1)(da)(ii) of the Act

Practitioners are advised to do what section 88 of the Act states and to provide the record of work to the owner and the Territorial Authority.

Was there a good reason for the Respondent failing to provide his record of work

- [31] The Respondent did not put forward any reason for failing to provide his record of work to the homeowner and the Council other than to demonstrate that he had given it to the main contractor. As discussed above, this does not meet the statutory requirements and, as such, does not constitute a good reason.

Did the Respondent fail to provide a record of work

- [32] The Respondent has failed to provide a record of work on the completion of restricted building work, and he has committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

Board's Decisions

- [33] The Respondent has committed a disciplinary offence under section 317(1) (da)(ii) of the Act.
- [34] The Respondent has not committed disciplinary offences under section 317(1)(b) and (d) of the Act.

Penalty, Costs and Publication

- [35] 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.
- [36] 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

- [37] The purpose of professional discipline is to uphold the integrity of the profession. The focus is the enforcement of a high standard of propriety and professional conduct. In determining the penalty, however, the Board necessarily has to consider whether the Respondent should be punished and how it can deter other Licensed Building Practitioners.¹⁰
- [38] In *Lochhead v Ministry of Business Innovation and Employment*,¹¹ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based

¹⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [39] The Board acknowledges that of the three charges against the Respondent, only one has been upheld. The Board's starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There were mitigating factors. The Respondent did provide it to the main contractor, and it was Mr [OMITTED]'s actions in withholding the records of work from the homeowner and Council which have given rise to this situation. There was no evidence that the Respondent was even aware that there was an issue over the provision of the record of work prior to this complaint.
- [40] Because of the mitigating factors, the penalty has been decreased to a fine of \$1,000.

Costs

- [41] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.¹²
- [42] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings¹³. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case¹⁴.
- [43] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderate. Adjustments are then made.
- [44] Ordinarily, the costs order for a full-day hearing, as this was, is \$7,000. As this was a consolidated hearing, the Board has adopted a total costs award to be apportioned between the three Licensed Building Practitioners of \$5,000.
- [45] As only the record of work disciplinary offence was upheld against the Respondent, the Board has allocated the smallest portion of the total costs to him. The Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [46] 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

¹² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

¹³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

¹⁴ *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.

Building Practitioners' scheme as is required by the Act,¹⁵ and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.

[47] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.¹⁶ Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.¹⁷

[48] Based on the above, the Board WILL NOT order further publication.

Section 318 Order

[49] 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 \$1,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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 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.

[50] 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

[51] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **28 April 2023**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

¹⁵ Refer sections 298, 299 and 301 of the Act

¹⁶ Section 14 of the Act

¹⁷ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 5th day April 2023



Mr M Orange
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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