Before the Building Practitioners Board

	BPB Complaint No. CB25370
Licensed Building Practitioner:	Baixiang (David) Lee (the Respondent)
Licence Number:	BP 101144
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 and Decision Date:	22 September 2020

Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)
Robin Dunlop, Retired Professional Engineer
Rob Shao, LBP, Carpentry and Site AOP 1
Frank Thomas, LBP, Roofing

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.

Decision:

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

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Summary of the Board's Decision

[1] The Respondent carried out building work in a negligent manner and in a manner that was contrary to a building consent in relation to structural elements, which was noted in a failed Council inspection and in an Engineer's Site Observations. He also failed to provide record of work on completion of restricted building work.

The Charges

[2] On 17 April 2020, the Board received a Registrar's Report in respect of a complaint into the conduct of the Respondent.

[3] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.

[4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations. The allegations that the Board decided to further investigate were that the Respondent had:

(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).

Regulation 9 Decisions

[5] The complaint to the Board also contained an allegation that the Respondent had conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[6] With regard to that allegation, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

> ***Complaint not warranting further investigation***
> *A complaint does not warrant further investigation if—*
> *(a) the investigation of it is—*
> *(ii) unnecessary;*

[7] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

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

[8] It is on the basis of the above matters, and the facts as presented in the complaint and response, that the Board has decided that it will not proceed with the allegations of negligence or incompetence or of disrepute.

The Hearing

[9] The Board, on receiving a Registrar's Report in respect of the matter, initially reviewed the file and decided to deal with it by way of a Draft Decision.

[10] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.

Function of Disciplinary Action

[11] 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*[1] and in New Zealand in *Dentice v Valuers Registration Board*[2].

[12] 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*[3] 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."*

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

> *… 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.*

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

[15] 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

[16] 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.

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

[17] 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

[18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[19] The 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.

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

Baixiang (David) Lee	Respondent
[Omitted]	Complainant
[Omitted]	Engineer, [Omitted]
[Omitted]	Auckland Council Inspector

[21] The Board was assisted by an interpreter.

[22] The Respondent was engaged to carry out building work on an alteration under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started in May 2018 and came to an end on or about 18 September 2019 when the Complainant emailed the Respondent cancelling the contract. A record of work dated 18 September 2020 was provided for the restricted building work, but only after a complaint had been made and just prior to the hearing. It was provided to the Board. It was not provided to the persons specified in section 88 of the Act, the owner or the territorial authority.

[23] The Respondent gave evidence at the hearing that he was not sure if he had to provide a record of work as the contract had been terminated, notwithstanding that a complaint had been made and the Board had issued a Draft Decision dealing with the matter. He stated that he was advised by the Council that he had to do one on 3 July 2020. He then proceeded to complete one on 18 September 2020 and to provide it to the Board in advance of the hearing on 22 September 2020.

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

[24] The building work that was complained about related to failed inspections. The Board was provided with a copy of a failed frame and truss inspection dated 11 June 2019 which noted:

> *From previous*
>
> ** Point load to lintel western elevation ; lintel deflecting under point load - wrong grade and size lintel used; replace with 240 x 2.2.8, 90 Hy beam as consented design - replaced with Hy beam:*
> *consented cleared*
>
> ** end stud to existing connection - 2 x 90 jolts at 400 crs - still to come*
>
> ** subfloor point load(s) as marked up on drawings - loads should be carried directly to ground under NZS3604 - bring to attention of engineer and fit 125x125 H5 piles in place to correct. - engineer has covered this item in his PS4*
>
> ** Lower : A1 provide and fix extra strap, C1, A2 element not long enough 1.2m - completed engineer covered PS4 and site note*
>
> *N.B. SUBFLOOR YET TO COME ; take care, some new piles 100x100 H4 - Subfloor viewed ; Cleared*
>
> *Items to address, may be seen at cavity wrap*
>
> ** end stud to existing connection - 2 x 90 jolts at 400 crs*
>
> ** Bracing to come : upper C1 (when broken into existing house)*
>
> ** Joist kits to joists above braced piles*
>
> ** Two braced piles to change direction of angle - see marked up drawing*
>
> *Otherwise all okay*
>
> *Next inspection cavity wrap*

[25] The complaint included a Site Observation Record from [Omitted], the Engineer to the contract. The Engineer noted failed inspections and "inconsistency to our design in superstructure". The Site Observation noted:

> *<u>Item 1: Timber Lintel L2</u>*
>
> *Wrong grade and size timber lintel L2 used – Instructed contractor to replace time lintel with 240hy90 as consented plan.*
>
> *<u>Item 2: Bracing A2</u>*
>
> *Sighted wall length for Bracing A2 at ground floor is not long enough.*
>
> *<u>Item 3: Bracing C1</u>*

Contractor advised on site that client would like to keep the existing windows along C1 at ground level, which will shorter the bracing C1.

Item 4: Subfloor Bearer B5

*Sighted missing Subfloor Bearer B5 (2/190*45) – Instructed contractor to add bearer as consented plan.*

Item 5: Additional Floor Joists

Sighted point loads & LBW from above are not supported directly by subfloor bearers as consented plan – contractor to add additional noggins/blocking in-between floor joists under all LBW and add additional floor joists as per sketch below.

Item 6: Roof Shape Changes

Sighted changes in roof shape at top of WD area. Please check and confirm with architect for the changes, which may case new point load from new roof shape.

[26] The roof shape changes related to a dormer window that was added and was not part of the original consented plan.

[27] Emails from the architectural designer were also provided. The designer noted:

- *Appears that Hyspan bearers supporting the house have not been correctly treated these should be H3.1 as specified on drawings.*
- *The bearers appear to be fixed with galvanised fixing these should be stainless steel as specified on drawings.*

[28] The remedial builder engaged to carry on with the build noted the remedial work that had to be completed. The Remedial builder expressed his opinion that "the site and the build is one of the worst I have seen".

[29] The Respondent provided a written response. He noted he was reluctant to carry out the additional work of an extra dormer window as it was not included in the original building consent and that he only carries out work as per the consent. The Respondent implied that the Complainant and others involved in the work were responsible for compliance issues although he did acknowledge an error with the wrong timber size and missed subfloor bearer. The Respondent also referred to a Site Meeting Inspection of 16 June 2019 and a stop-work notice. He provided a copy of the Auckland Council record of the inspection which stated:

Reason for site meeting

to advise whether amendment is required for addition of roof dormer - as the dormer requires Planning approval it requires full Amendment - it is unclear whether there is already a resource consent or not as evidence has not been provided also it was noted previous fails

[30] The Respondent, in response to an enquiry about his record of work, stated:

> *I have already sent to your email about start date. the [Omitted]sent a letter to me about stop work and no allow me go to his house from 18/9/2019. I need clear the work "stop the work" by [Omitted] but is not finish date. as the case is not completion so I could not submit about record of work. also I don't know what does he doing in the building.*

[31] At the hearing, the Respondent accepted that he had made some mistakes but that they were minor in nature and that the complaint did not acknowledge the good work that had been done on site. The Respondent reiterated that he could not carry out any work on the dormer window until such time as an amendment to the building consent was issued, and the delays resulted in the contract being terminated.

[32] The Board questioned the witnesses about failed inspection items:

Timber lintel – the Council witness noted that the consent required an engineered timber beam and that an LVL beam was on site but had not been used. He stated that the beam was sagging or deflecting under the load. The Engineer stated that the lintel was one size down from that specified and was not the correct grade. He noted visual deflection and that the beam was carrying the load from a wall above it. He stated that the strength of the beam would have been acceptable but that the deflection was not, as a ranch slider was to be installed underneath it. The Respondent stated that it was a mistake and that it has been replaced.

Sub floor point loads – a post carrying the load of a steel beam landed on a particle floor when it should have landed on a joist so as to carry and spread the load of the beam. The Respondent stated that it came about as a result of stairs being moved to create headroom for the stairs and that there was a flow-on effect. The Respondent stated that he forget to check the impact on the subfloor.

Strapping – the Engineer gave evidence that revised bracing designs were required as a result of internal layout changes. A brace wall had been shortened. A new bracing wall had to be established to accommodate for the loss of a bracing element. The Respondent gave evidence that the change was instructed by the Complainant's parents. He did not discuss the change with the designer, engineer or Council. No building consent change process was followed. The Respondent stated he was just keeping the customer happy. The Council witness noted that a minor variation or possibly an amendment would have been required.

Braced piles – the issue related to point loads and load transfer to the ground. The Council Inspector noted that there were areas in the subfloor where the load transfer was not correct. The Engineer stated that there were missing building elements which resulted in the point loads being missed. The Respondent accepted the issue and stated that it was a mistake in that it had been missed.

[33] The Board also heard evidence about the design change in respect of the dormer window. The change came about as a result of the stairs being moved and the need to create headroom. The building consent changes were being dealt with by the designer who had carried out the building consent application. The Complainant's issue was that the trusses were ordered prior to the change being dealt with and that the trusses did not accommodate for the change.

[34] The Board questioned the Respondent about his supervision. The Respondent stated that he had between two and four persons that he described as handymen on site and that he checked on them and the work every day. The Complainant stated the Respondent was seldomly on site.

Board's Conclusion and Reasoning

[35] 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.

[36] The Board's decision in respect of negligence and building contrary to a building consent relates to the items noted in the failed council inspection and the Engineer's Site Observation.

[37] The Board has not made a disciplinary finding in relation to the dormer window. The Board decided that it was a design issue, it was being dealt with by the designer and that, as building work on the change had not proceeded, the Respondent had acted in an acceptable manner.

<u>Negligence</u>

[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*[6] test of negligence which has been adopted by the New Zealand Courts[7].

[39] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[8]. 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 Act[9]. 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 practitioner[10].

[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—*
>
> *(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 Code[11] and be carried out in accordance with a building

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

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

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

[9] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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

[11] Section 17 of the Building Act 2004

consent[12]. 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 Board had clear evidence of multiple contraventions of the Clause B1 of the Building Code and of the building consent issued. These were identified by the building consent authority and by the Engineer to the contract. Clause B1 covers structural requirements. It provides:

> ***OBJECTIVE***
>
> ***B1.1*** *The objective of this provision is to:*
>
> *(a) Safeguard people from injury caused by structural failure,*
>
> *(b) Safeguard people from loss of amenity caused by structural behaviour, and*
>
> *(c) Protect other property from physical damage caused by structural failure.*
>
> ***FUNCTIONAL REQUIREMENT***
>
> ***B1.2*** *Buildings, building elements and sitework shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives.*

[44] Ensuring the structural elements of a build are compliant is essential to the long-term performance of the build. What was particularly disconcerting was the fact that structural elements were missing showing a lack of attention being paid to the consented plans. The Respondent, by failing to ensure structural elements were constructed in a compliant manner, has fallen below the expected standards of a licensed building practitioner.

[45] Turning to seriousness in *Collie v Nursing Council of New Zealand*[13] 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.*

[46] There were multiple failings that had to be brought to the Respondent's attention for rectification. The Respondent accepted some items and stated that the issues raised were minor. The Board did not agree. The matters raised were serious. They related to the structure of the dwelling. They were mistakes that should not have been made in the first place.

[12] Section 40(1) of the Building Act 2004
[13] [2001] NZAR 74

[47] The Board notes that the Council's role is to check that the building work has been carried out in accordance with the building consent. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not always follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

(a) whether there is any form of system or process to identify quality and/or compliance issues;
(b) the extent and seriousness of the non-compliance;
(c) whether there is a pattern of continued non-compliance; and
(d) what steps are taken when non-compliance issues are raised.

[48] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing,[14] it was noted by the responsible Minister:

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

[49] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention for the enabling legislation[15]:

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

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

accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

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

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

[51] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner include taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

[52] It is also on this basis that the Board, which includes persons with extensive experience and expertise in the building industry, has decided that 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.

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

[53] There are two aspects to the failure to build in accordance with the building consent. The first was in respect of items that were, quite simply, not built in strict accordance with the building consent. Structural elements were undersized, the wrong timber grade, missing or built incorrectly. Unlike negligence, contrary to a building consent is a 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

established[16]. Given the contraventions noted it follows that the disciplinary offence has been committed.

[54] The Board accepted that the Respondent had not carried out building work contrary to a building consent in respect of the dormer window. There was, however, other building work as noted in the Council failed inspection and the Engineer's Site Observation that was not in accordance with the building consent. On the basis of the above, the Board finds that the disciplinary offence has been committed.

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 work[17].

[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 C2-01170[18] 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*[19] "… 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. 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.

[61] The Respondent has submitted that completion had not occurred. The Board does not accept that submission. The contract was cancelled, and the Respondent would

[16] *Blewman v Wilkinson* [1979] 2 NZLR 208
[17] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[18] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[19] [2018] NZHC 1662 at para 50

not be returning to carry out any further restricted building work. As such, from a record of work perspective, completion had occurred. It should be noted in this respect that the purpose of the record of work provisions in the Act are to create a record of all licensed building practitioners who have carried out or supervised restricted building work. That purpose would be defeated if there was a requirement to complete all of the intended work prior to providing a record of work as, in cases such as this where a contract has been terminated, the obligation to provide one would never arise.

[62] The Board finds that completion, from a record of work perspective, occurred in September 2019. A record of work was not provided until just prior to the hearing and then only to the Board. 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.

[64] In this instance, there was an ongoing 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 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[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[67] The Respondent made submissions at the hearing as regards penalty, costs and publication. The Board proceeded to make a decision on those matters.

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[20] 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] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[21] 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.

[70] The Board considered that a fine was the most appropriate form of penalty to be imposed. In its Draft Decision it indicated a fine of $3,500 would be appropriate. The Board notes that the same findings have been made at the hearing but that the Respondent did not carry out building work contrary to a building consent as regards a dormer window.

[71] The Respondent submitted that he did make some mistakes but that most of the work was correct. He noted that most of his work was new builds and that he did not do many alterations. He stated he would, in the future, stick with new builds.

[72] The Board noted that the Respondent would be wise to work within his competence, especially given the provisions of section 314B of the Act which requires as much and section 317(1)(h) of the Act which makes it an offence to work outside of one's personal competence.

[73] On the basis of the above factors, the Board has decided that a fine of $3,000 is appropriate.

<u>Costs</u>

[74] 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."

[75] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[22].

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[20] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[21] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[22] *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.

[76] In *Collie v Nursing Council of New Zealand*[23] 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.*

[77] The Board notes that the Respondent requested a hearing. The charges were upheld. The Board's scale of costs for a half-day hearing is $3,500. There are no reasons to change the amount.

Publication

[78] 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[24]. 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.*

[79] 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.

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

[81] 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[29]. 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.

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

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[23] [2001] NZAR 74
[24] Refer sections 298, 299 and 301 of the Act
[25] Section 14 of the Act
[26] Refer sections 200 and 202 of the Criminal Procedure Act
[27] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[28] ibid
[29] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $3,000.**

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(1)(iii) of the Act.**

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

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

Right of Appeal

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

Signed and dated this 14th day of October 2020

Mel Orange
Presiding Member

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

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any

case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

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

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

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

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

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

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

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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

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