

## **Before the Building Practitioners Board**

	BPB Complaint No. CB26039
Licensed Building Practitioner:	Lifeng Liang (the Respondent)
Licence Number:	BP121875
Licence(s) Held:	Bricklaying and Blocklaying – Structural Masonry, Veneer

---

### **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	Board Inquiry
Hearing Type:	On the Papers
Draft Decision Date:	10 November 2022
Final Decision Date:	3 February 2023

#### **Board Members Present:**

Mr M Orange, Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Ms J Clark, Barrister and Solicitor, Legal Member  
Mr G Anderson, LBP, Carpentry and Site AOP 2

#### **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.

## Contents

<b>Summary of the Board’s Final Decision</b> .....	2
<b>The Board</b> .....	2
<b>The Charges</b> .....	2
Regulation 21 Decisions.....	3
Disciplinary Offence to be Investigated.....	3
<b>Decision Process</b> .....	4
<b>Evidence</b> .....	4
<b>Board’s Conclusion and Reasoning</b> .....	5
<b>Decision on Penalty, Costs and Publication</b> .....	7
Penalty .....	7
Costs.....	8
Publication .....	9
<b>Right of Appeal</b> .....	10

### Summary of the Board’s Final Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,000 and ordered to pay costs of \$500. The fine was reduced from a starting point of \$1,500 on the basis that the Board dealt with two record of work matters about the Respondent at the same time and it decided to impose a fine of \$1,000 for each.

### The Board

- [2] The Board is a statutory body established under the Building Act.<sup>1</sup> Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

### The Charges

- [3] On 10 November 2022, the Board received a Registrar’s Report in respect of a Board Inquiry into the conduct of the Respondent.
- [4] Under regulation 22 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 21 of the Complaints Regulations applies.
- [5] Having received the report, the Board decided that regulation 21 applied to aspects of the complaint but not to all of the allegations.

---

<sup>1</sup> Section 341 of the Act.

## Regulation 21 Decisions

- [6] The Board Inquiry also contained allegations that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (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).
- [7] With regard to those allegations, the Board decided that regulation 21(d)(ii) of the Complaints Regulations applied. It provides:

### **21 Matter not warranting continuation of inquiry**

*A matter does not warrant the Board continuing an inquiry into it if—*

- (d) *continuing the inquiry is—*
  - (ii) *unnecessary;*

- [8] In considering whether the investigation of a matter is necessary, the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*<sup>2</sup>, Justice Gendall stated, as regards the threshold for disciplinary matters:

*[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.*

- [9] Again, in *Pillai v Messiter (No 2)*,<sup>3</sup> the Court of Appeal stated:

*... 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.*

- [10] It is on the basis of the above matters and the facts as presented that the Board has decided that it will not proceed with the allegations of negligence or incompetence or building contrary to a building consent.

## Disciplinary Offence to be Investigated

- [11] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had 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

---

<sup>2</sup> [2001] NZAR 74

<sup>3</sup> (1989) 16 NSWLR 197 (CA) at 200

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).

[12] Under regulation 22, the Board is required to hold a hearing in respect of that matter.

### **Decision Process**

[13] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures<sup>4</sup>. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation<sup>5</sup>. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

[14] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers.

[15] The Board did, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, it issued a draft decision. The Complainant and the Respondent were provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board had directed, or the Respondent had requested an in-person hearing, then the Board advised that one would have been scheduled. The Respondent provided a submission dated 17 January 2023.

### **Evidence**

[16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[17] The Respondent was engaged to carry out building work on a new residential build 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 on or about 10 April 2019 and came to an end around the end of July 2019.

---

<sup>4</sup> Clause 27 of Schedule 3

<sup>5</sup> *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [18] The Respondent provided a response. He stated he produced a record of work dated 5 February 2020 and that he provided it to the offices of [OMITTED] a few days later. [OMITTED] were the head contractors. He did not provide a copy of the record of work with the response and stated, when a copy was requested in July 2022, that he had not retained a copy. On 17 August 2022, the Respondent emailed the Board with the purpose of providing a record of work. One was not attached, and the Respondent has not replied to subsequent queries to provide it.
- [19] On 9 September 2022, a copy of the building consent file was obtained from the Territorial Authority. It did not contain a record of work from the Respondent. It did contain a Code Compliance Certificate issued on 16 April 2021.

#### **Further Evidence and Submissions.**

- [20] Following the Board issuing a draft decision, the Board received a submission from the Respondent on 17 January 2023.
- [21] The Respondent reiterated that he had given a record of work dated 5 February 2020 to [OMITTED], being the head contractor for the project. He did not provide a copy of the record of work.

#### **Board's Conclusion and Reasoning**

- [22] The Board has decided that the Respondent **has** 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.
- [23] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>7</sup>.
- [24] 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.
- [25] The Board discussed issues with regard to records of work in its decision C2-01170<sup>8</sup> 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.

---

<sup>7</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>8</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [26] 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.
- [27] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*<sup>9</sup> “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [28] As to when completion will have occurred is a question of fact in each case.
- [29] 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 or about July 2019. The Respondent stated he provided a record of work to the main contractor on or about 5 February 2020, some seven months after completion. He has not been able to substantiate this. The record of work was not provided to the owner or the Territorial Authority.
- [30] On the basis of the above, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [31] 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.
- [32] The Respondent stated he provided a record of work to [OMITTED]. He reiterated this in his further submission. The Respondent has not however provided a copy of that record of work, despite being requested to do so by the Investigator.
- [33] [OMITTED] are not the owner. The provision was well after completion. The obligation is to provide the record of work to the owner and the Territorial Authority, not the main contractor. In this respect, 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 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.

---

<sup>9</sup> [2018] NZHC 1662 at para 50

- [34] 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.

#### **Decision on 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 Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [36] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board decided to make indicative orders and gave the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.
- [37] In response to the Draft Decision the Respondent stated that he had no comments on the penalty but also said –“*we are hard workers, ...Really upset dealing with this matters.*”

#### **Penalty**

- [38] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>10</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [39] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>11</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [40] Record of work matters are at the lower end of the disciplinary scale. The Board’s normal 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.

---

<sup>10</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>11</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

- [41] The Respondent has previously been disciplined by the Board for a failure to provide a record of work. The conduct in the matter, however, does not predate the earlier decision. As such, it is not an aggravating factor.
- [42] The Board is, however, presently dealing with a Board Inquiry about the Respondent's conduct in relation to another record of work matter. It has decided that the normal tariff, when taken into consideration with the other matter before the Board, would be excessive. As such, it has decided to reduce the fine to \$1,000 on the basis that it will impose the same reduced fine on the other matter.

#### Costs

- [43] 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."
- [44] 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<sup>12</sup>.
- [45] In *Collie v Nursing Council of New Zealand*,<sup>13</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

*But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

- [46] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>14</sup> the High Court noted:

*[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*

*[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

---

<sup>12</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

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

<sup>14</sup> CIV-2011-485-000227 8 August 2011

- [47] 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 simple. Adjustments based on the High Court decisions above are then made.
- [48] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

### Publication

- [49] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>15</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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

- [50] 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.
- [51] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>16</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>17</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>18</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>19</sup>.
- [52] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>20</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

---

<sup>15</sup> Refer sections 298, 299 and 301 of the Act

<sup>16</sup> Section 14 of the Act

<sup>17</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>18</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>19</sup> *ibid*

<sup>20</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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

### Section 318 Order

[54] 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 \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

In terms of section 318(5) of the Act, there will 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.

[55] 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

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

Signed and dated this 10<sup>th</sup> day of February 2023



**Mr M Orange**  
Presiding Member

---

#### <sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

- 
- (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
  - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
  - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
  - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

**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.*