

Before the Building Practitioners Board

	BPB Complaint No. CB25966
Licensed Building Practitioner:	Mark Liu (the Respondent)
Licence Number:	BP132003
Licence(s) Held:	Foundations – Concrete foundation walls and Concrete slab-on-ground; Bricklaying and Blocklaying – Veneer and Structural Masonry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	9 March 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Ms K Reynolds, Construction Manager
	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.

The Respondent is fined \$1,000 and ordered to pay costs of \$1,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

[1] The Respondent supervised foundations work on two blocks of units. He also contracted to complete blockwork. The blockwork was supervised by another Licensed Building Practitioner. The issues before the Board were whether the building work that was supervised by Respondent had been carried out in a negligent or incompetent manner or in a manner that was contrary to the building work. Also, at issue was whether a record of work had been provided on completion of restricted building work.

- [2] This decision sets out that whilst there were quality and compliance issues with the foundations, those issues were not serious enough for the Board to make a disciplinary finding. It also notes that the Respondent's restricted building work was complete and that a record of work had not been provided.
- [3] 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 \$1,500. 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

- [4] 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
- [5] 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 contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to 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 has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [6] In considering the allegations under sections 317(1)(b) and (d) of the Act, the Board gave notice that it would investigate the matters (except items 7 and 11) set out in the summary of issues document provided by the Complainant.

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.

Negligence or Incompetence

[7] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,³ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁴ test of negligence.⁵ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁶ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁷ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

[8] When considering what an acceptable standard is, the Board consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁸ and any building consent issued⁹. The test is an objective one.¹⁰

[9] The Respondent was contracted to construct the foundations and block work for two blocks of units that were being developed. Each block had two storeys and five units. At the time the work was carried out, the Respondent held a Foundations License. He was not licensed to carry out or supervise block work. He subcontracted Mr [OMITTED], a Licensed Building Practitioner with a Brick and Blocklaying Licence to supervise workers supplied by the Respondent. As the Respondent was not the Licensed Building Practitioner responsible for blockwork, the Board was not able to make a finding against him with respect to issues raised in the reports about the blockwork.

[10] The Respondent was the supervising Licensed Building Practitioner for the foundations. The foundations were set out, and the boxing was constructed by the Respondent's staff under his supervision. The Complainant, who was not an industry professional, but did have some experience in multi-unit developments, acted as the

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 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.

⁴ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁵ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁶ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as "a demonstrated lack of the reasonably expected ability or skill level". In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as "an inability to do the job"

⁷ *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".

⁸ Section 17 of the Building Act 2004

⁹ Section 40(1) of the Building Act 2004

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

project manager. She compiled a report on issues with the foundations. Those issues were an incorrect finished floor level on the porch entries on units 5, 6, 7 and 10, an out-of-square foundation on bedroom 1 of unit 1, building wrap imprints on foundation sides and a bowed foundation edge.

Porch Entries

- [11] The Respondent's evidence was that the foundation had been set out to accommodate a lower finished floor level for the porch entries. He believed the subcontracted concrete layers had removed the boxing. The Board noted that the porch entry on other units was not complained about, so his explanation may have been correct and that the plans lacked adequate detail for the porch entries. Attempts were made to cut concrete away to reduce the finished floor level to accommodate a tiled entrance. The work was not completed to an acceptable standard. The Respondent, as the supervising Licensed Building Practitioner, was also responsible for the concrete placement. He should have checked or had processes in place to check, that the concrete placement was complete to an acceptable standard.

Out-of-square

- [12] One corner of a large and complex foundation was not square. As a result, the framing overhung the foundation. An engineered bracket to carry the framing load was required. The Respondent accepted that his staff had not set the foundation out correctly in bedroom 1, unit 1 area. The building work was not completed to an acceptable standard.

Building wrap imprints

- [13] The damp-proof membrane installed in the foundation was trapped between the boxing and the poured concrete. It left an unsightly edge. Remediation was simple, and the issue would not have compromised the foundation. As the issue was aesthetic and minor, the Board found that the work had been completed to an acceptable standard.

Bowed foundation edge

- [14] One area of the foundation had bulged by approximately 15mm. There was a gap between the framing installed on top of it and the edge of the foundation. The Complainant wanted the foundation edge to be cut back. The Respondent's explanation was that the pressure of the concrete when it was poured may have pushed the boxing out. He stated the foundation could be ground back. The building work had not been completed to an acceptable standard.

Was the conduct serious enough

- [15] There were three areas where the building work had not been completed to an acceptable standard. They were in relation to the finished floor level of 4 porches, the foundation being out-of-square in one corner and the foundation bulging in one

area. The most serious item was the foundation being out-of-square, as this impacted the framing that sat on top of it. The finished floor levels of the porches resulted from the actions of others, and the bulging foundation is something that can happen. Both were minor departures. Because of this, and because the overall departures were, given the size of the foundations, limited, the Board decided that the conduct did not reach the disciplinary threshold.

Has the Respondent been negligent or incompetent

- [16] Whilst there were aspects of the foundations that had not been completed to an acceptable standard, the Board decided that the conduct did not reach the threshold for a disciplinary finding to be made. Therefore, the finding is that the Respondent has not carried out or supervised building work in a negligent or incompetent manner.
- [17] The Respondent should note that the Licensed Building Practitioner regime was enacted to improve the quality and compliance of building work. Practitioners should aim to get the work right the first time. There should not be an over-reliance on the ability to return and carry out rectification work.

A comment about supervision

- [18] The Respondent gave evidence that he is carrying out a high volume of work and that he has some 40 staff members under his supervision. When describing his supervision procedures, it appeared that he uses remote supervision but that he does do a daily review of pictures sent to him of completed work.
- [19] The Respondent's ratio of Licensed Building Practitioners to staff is very low (40:1). That puts his ability to provide adequate supervision at risk. He should consider employing or engaging additional Licensed Building Practitioners to assist with supervision. The Respondent is also warned against a one-size-fits-all approach to supervision. Some complex foundations or difficult sites may require a higher degree of closer or more direct supervision. The Respondent should obtain and study the Ministry of Business Innovation and Employment Supervision Guidelines and ensure that his supervision practices are in line with it.

Contrary to a Building Consent

- [20] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.¹¹ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹² Building consents also stipulate the number and type of inspections the

¹¹ Section 49 of the Act

¹² Section 40 of the Act

issuing authority will carry out during the build.¹³ Inspections ensure independent verification that the building consent is being complied with.

- [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.¹⁴ 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.¹⁵ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent

- [22] Technically, the incorrect finished floor levels on porches and the out-of-square foundation amounted to building work that had not been completed in accordance with the building consent issued for the work.

Was the conduct serious enough

- [23] As with the Board's finding under negligence, the departures from the building consent were not serious enough to make a finding under section 317(1)(d) of the Act.

Has the Respondent breached section 317(1)(d) of the Act

- [24] The Respondent has not breached the disciplinary provision.

Failure to Provide a Record of Work

- [25] 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.¹⁶
- [26] 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 work¹⁷ unless there is a good reason for it not to be provided.¹⁸

¹³ Section 222 of the Act

¹⁴ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁵ *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".

¹⁶ Section 88(1) of the Act.

¹⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁸ Section 317(1)(da)(ii) of the Act

Did the Respondent carry out or supervise restricted building work

[27] The Respondent supervised foundations, a type of restricted building work. He argued, however, that the restricted building work was not complete.

Was the restricted building work complete

[28] The foundations were complete. Blockwork, which was being supervised by Mr [OMITTED], had some outstanding work to be completed. That work was finished by another contractor. A Code Compliance Certificate has now been issued. The Respondent was aware that others had completed the work.

[29] The Respondent was given advice by his lawyer that, under the terms of the contract, he did not have to provide a record of work until the contract was fully complete. He relied on that advice.

[30] The question for the Board was whether, under those circumstances, the Respondent's restricted building work on those two dwellings was also complete.¹⁹

[31] The restricted building work regime exists to ensure that there is a permanent record of all of the Licensed Building Practitioners who have carried out or supervised restricted building work. If the Board accepted the Respondent's argument, then the obligation to provide a record of work would never arise, given that others had finished what the Respondent had started.²⁰ That would defeat the purpose of the legislative provision. As such, the Board finds that completion occurred when the Respondent's engagement on the build came to an end, and that was when a record of work was due.

Has the Respondent provided a record of work

[32] The Respondent has not provided a record of work.

Was there a good reason for the Respondent to withhold his records of work

[33] The Respondent has put forward that he relied on the advice of his lawyer. The lawyer's advice was incorrect. The Respondent has since relicensed. He acknowledged that his understanding of his record of work obligations was not correct. He has now modified his practices.

[34] As a Licensed Building Practitioner, the Respondent should have been aware of his record of work obligations. The Board and the Ministry of Business Innovation and Employment have issued articles and compulsory training modules about those obligations. The Respondent should have known better, and the Board finds that he did not have a good reason.

¹⁹ Justice Muir at paragraph 50 in *Ministry of Business Innovation and Employment v Bell* [2018] NZHC 1662 stated "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

²⁰ The Licensed Building Practitioner who finished off the work is also required to provide a record of work.

Did the Respondent fail to provide a record of work

- [35] 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.

Penalty, Costs and Publication

- [36] Having found that the Respondent has committed a disciplinary offence under section 317(1)(da)(ii) of the Act, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

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.²¹
- [38] In *Lochhead v Ministry of Business Innovation and Employment*,²² the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [39] 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 relied on wrong advice, and he suffered claimed he had suffered a financial loss. He has changed his record of work practices. Taking those mitigating factors into consideration, the Board decided to reduce the fine to \$1,000.

Costs

- [40] 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.²³

²¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

²³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [41] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁴. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁵.
- [42] 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 moderately complex. Adjustments are then made.
- [43] Ordinarily, a cost order for a hearing of this type would be \$3,500. However, as the Respondent has been partially successful in his defence, the Board has decided that a reduced costs order is warranted. The Respondent is to pay \$1,500.

Publication

- [44] 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 Act²⁶ and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [45] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁷ 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.²⁸
- [46] Based on the above, the Board will not order further publication.

Section 318 Order

- [47] 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 \$1,500 (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.

²⁴ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁵ *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.

²⁶ Refer sections 298, 299 and 301 of the Act

²⁷ Section 14 of the Act

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

- [48] 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

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

Signed and dated this 21st day of March 2023



M Orange
Presiding Member

ⁱ Section 3 of the Act

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.*

ⁱⁱ 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*

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- (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."*

iii **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.*