

Before the Building Practitioners Board

	BPB Complaint No. CB25183
Licensed Building Practitioner:	Feng Lu (the Respondent)
Licence Number:	BP 121132
Licence(s) Held:	Design AOP 1, Carpentry, Site AOP 1

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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In person
Hearing Date:	23 September 2020
Decision Date:	1 October 2020

Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)
Faye Pearson-Green, LBP, Design AOP 2
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.

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent has failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$500. The allegations of negligence and/or incompetence is not upheld on the basis that the conduct was not serious enough. The allegation of building contrary to a building consent is not upheld on the basis that the building consent was amended prior to the associated building work being carried out.

The Hearing

- [2] The Board, on receiving a Registrar’s Report, reviewed the file and decided to deal with it by way of a Draft Decision.
- [3] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.

The Charges

- [4] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at *[Omitted]*. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s317(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) (s317(1)(da)(ii) of the Act).

Function of Disciplinary Action

- [5] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [6] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:
- “... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*
- [7] 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

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

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

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

- [8] 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.
- [9] 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

- [10] 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.
- [11] 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

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [13] 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.

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

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

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

Feng Lu	Respondent
<i>[Omitted]</i>	Complainant
Martin Perkovic	Auckland Council Inspector
<i>[Omitted]</i>	Witness for the Respondent
<i>[Omitted]</i>	Witness for the Respondent

[15] The Board was assisted by an interpreter.

[16] The Respondent was engaged to carry out building work under a building consent. The building work started in July 2017 and came to an end on or about 24 March 2019. A record of work has not been provided by the Respondent for his restricted building work.

[17] The issue the Board was investigating, in addition to a possible failure to provide a record of work, was whether the Respondent had been negligent in respect of a change to the exterior cladding on a minor dwelling.

[18] The building work in question was carried out under a building consent issued on 15 September 2016. The stamped plans were noted as both being “Approved” and “Amended” on the same date. The External Cladding Material Schedule on sheets A401, A402, A403 and A404 specified: C1 – James Hardie Linea Weatherboard (16mm) with 20mm Cavity. The requirement applied to all of the elevations. The consented drawings also provided details for H3.2 selected bevel-back weatherboards on 20mm cavity battens.

[19] Drawing A201 of the consented plans contained a note that had been added following a request for information which stated:

EXTERIOR CLADDING IS JAMES HARDIE’S Lenea WEATHERBOARD (16mm)
 EXTERNAL FIRE RATED WALL FRAMING SHALL BE 90x45@400mm C/C MAX.
 EXTERNAL FIRE RATING WALL SHALL USE JAMES HARDIE FIRE RESISTANCE
 SYSTEM NUMBER: JHETJJ60 (FRR60/60/60) TO PROVIDE 60 MINUTES FIRE
 RESISTANCE.

[20] The minor dwelling was, at its closest point, was within 1 metre from the existing dwelling. This proximity would have triggered a requirement for a fire-rated wall in the adjacent walls of the minor dwelling.

[21] During construction, the Respondent used timber weatherboards. He noted that the use of timber weatherboards was consistent with drawings A801, A802, A803, A804, A805 and A807 and that the consented plans did not mention Linea.

[22] A Council Building Inspector raised questions with regard to fire rating. A Fire and Egress Report dated April 2018 was issued by a Fire Engineer. It noted that fire rating

requirements would be met if all external timber studs wall situated within 1 metre of the notional boundary were fire rated to FRR 30/30/30 and the window was positioned greater than 1 metre from the notional boundary. A “site advice” inspection on 6 March 2018 and a site notice issued noted that an amendment was required.

- [23] An amendment drawing was lodged on or about 16 April 2018 noted, on drawing F2A: “External wall 1.4m from corner to be fire rated with full-length wall studs at 40c/c. Details refer to engineer design”. Drawing F6A contained specific detail on the areas to be fire rated. The amended drawing also showed a change to the bathroom layout to suit the new compliant window position. Braced wall positions were also changed to suit the new bathroom window position.
- [24] The Respondent stated, in his response to the Complaint, that he raised issues with fire rating at the commencement of the project but that the designer refused to provide details. The designer also stated that sheet A101 stated “F/W to be installed as appropriate” meaning that the minor dwelling did not need a firewall. Sheet A101 was the Proposed Site Plan.
- [25] At the hearing, the Board heard evidence that the Respondent priced the project with timber weatherboards on the basis of the consented plans and that this was accepted by the owners. During the build, and prior to any weatherboards being installed, the Respondent raised the issue with fire-rating, and a solution was sought. The Council also raised the issue at an inspection and a site meeting was held. The solution involved the installation of linear weatherboards around the corner that required a fire rating. No building work was carried out whilst an amendment to allow for a combination of timber and linear weatherboards. The Respondent noted that there were difficulties were experienced with getting the designer to deal with the building consent amendment for a change of cladding. As a result, the Respondent dealt with the matter himself and submitted the building consent amendment, which was signed by the owner.
- [26] The Respondent also gave evidence that he had not provided a record of work as he had not been paid. He considered it was his only leverage to get paid.

Board’s Conclusion and Reasoning

- [27] 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.

- [28] The Board has also decided that the Respondent **has not:**
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); or
 - (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);

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

Record of Work

- [30] 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 work⁷.
- [31] 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.
- [32] 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.
- [33] 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*⁸ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".
- [34] 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.
- [35] In this instance, completion occurred in late March 2019. A record of work has not been provided. 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.
- [36] 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

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ [2018] NZHC 1662 at para 50

case will be decided by the Board on its own merits but the threshold for a good reason is high. No good reasons have been put forward.

- [37] The Board does note that there is an ongoing dispute. The Respondent has stated that he withheld the record of work as leverage. 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.
- [38] 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. The Respondent must act of his own accord and not wait for others to remind him of his obligations.

Negligence and/or Incompetence

- [39] The Board decided, with regard to the allegation of negligence or incompetence, that the conduct did not reach the threshold required to impose a disciplinary outcome.
- [40] The Board did consider that the Respondent, who holds a design licence, should have been aware of the requirement for a fire-rated wall at the time he priced the work, or that he should, at the least, have carried out further inquiries as regards the discrepancies in the consented plans as regards the cladding to be used.
- [41] Countering this, the Board noted that the Respondent stopped the building work when the issue became apparent on-site, that he called for a council inspection for site advice and that he did not carry out any further building work until such time as an amendment for a cladding change had been granted. It should be noted that if the building work had proceeded whilst an amendment was being sought, then the Board may have made a different decision.
- [42] With respect to the threshold for disciplinary matters in *Collie v Nursing Council of New Zealand*⁹ the Court's noted:

[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.

- [43] Again, in *Pillai v Messiter (No 2)*¹⁰ 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

⁹ [2001] NZAR 74

¹⁰ (1989) 16 NSWLR 197 (CA) at 200

includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [44] The Board refers to this as the seriousness test. The conduct before the Board needs to be sufficiently seriousness enough for it to take action. As noted above the Board has decided that whilst the Respondent should have resolved fire-rating and cladding issues prior to commencing the project, the matter was resolved during the project and, on that basis, the Respondent's conduct was not serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [45] A building consent amendment was issued prior to any work being carried out on the cladding change. Given this, the Board finds that the Respondent did not carry out building work contrary to a building consent.

Draft Decision on Penalty, Costs and Publication

- [46] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [47] The matter was dealt with at a hearing. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further submissions relevant to the indicative orders.

Penalty

- [48] 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*¹¹ 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.

- [49] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹² 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

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

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

- [50] The Board's only finding was with respect to the failure to provide a record of work. 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.
- [51] There are no mitigating factors. The refusal to provide a record of work for payment reasons and continued refusal to provide a record of work is an aggravating factor. The Board will not, however, increase the fine. It is set at \$1,500.

Costs

- [52] 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."
- [53] 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 case¹³.
- [54] In *Collie v Nursing Council of New Zealand*¹⁴ 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.*
- [55] The Board notes the matter was dealt with at a hearing. The Respondent was partially successful in requesting an in-person hearing. Given this, the Board will treat costs as if the matter was dealt with on the papers. On this basis, the Board will order that costs of \$500 be paid by the Respondent.

Publication

- [56] 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 Act¹⁵. 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.

¹³ *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.

¹⁴ [2001] NZAR 74

¹⁵ Refer sections 298, 299 and 301 of the Act

- [57] 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.
- [58] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁸. 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*¹⁹.
- [59] 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 interest²⁰. 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.
- [60] Based on the above, the Board will not order further publication.

Section 318 Order

- [61] 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 \$1,500.
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(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.

- [62] 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.

¹⁶ Section 14 of the Act

¹⁷ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

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

Submissions on Penalty, Costs and Publication

- [63] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on Date. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.
- [64] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 9th day of October 2020



Mel Orange
Presiding Member

ⁱ Section 318 of the Act

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

ⁱⁱ Section 330 Right of appeal

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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