Before the Building Practitioners Board

	BPB Complaint No. CB25957
Licensed Building Practitioner:	Phillip McKay (the Respondent)
Licence Number:	BP117862
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 Location	Auckland
Hearing Type:	In Person
Hearing Date:	10 February 2023
Decision Date:	24 February 2023

Board Members Present:

Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
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 disciplinary offences under sections 317(1)(b) and 317(1)(da)(ii) of the Act.

Contents

Summary of the Board's Decision

[1] The Respondent has carried out or supervised building work in a negligent manner and has failed to provide a record of work on the completion of restricted building work. He is fined $2,000 and ordered to pay costs of $3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

The Charges

[2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted], Auckland.

[3] At the hearing, the Board became aware that the Complainant no longer wished to proceed with the complaint and had advised that by email dated 6 April 2022.

[4] The disciplinary process and the Board's jurisdiction under the Act are inquisitorial. They do not rely on a complainant to present or prosecute a case against a respondent. This is provided for in the Regulations which state that if a complainant does not wish to proceed with a complaint, then the Board may proceed with its investigations by way of a Board Inquiry.

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

[5] Based on the above, the Board resolved at the hearing, to continue with this investigation as a Board Inquiry. The Board advised the Respondent and the Complainant of this decision at the commencement of the hearing.

[6] The Complainant had been summoned by the Board as a witness for the hearing and continued with his attendance at the hearing in the capacity of a witness.

[7] The Board's decision to continue with the hearing as a Board Inquiry was recorded in a Board Minute dated 14 February 2023.

[8] 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 (s 317(1)(b) of the Act). The matters to be investigated are those that are set out in a report by [Omitted] dated 9 June 2021; and/or

(b) 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).

[9] In further investigating the above matters, the Board was seeking clarification of which of the units on the site the building work complained about was carried out, who was involved in that building work, and whether the unit in question came within the definitions of restricted building work in the Building (Definition of Restricted Building Work) Order 2011.

Function of Disciplinary Action

[10] 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].

[11] 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*

[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

> *maintained in order to protect clients, the profession and the broader community."*

[12] 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[5]:

> *… 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.*

[13] 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.

[14] 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

[15] 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.

Evidence

[16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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 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

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

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

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.

[18] In addition to the documentary evidence before it, the Board heard evidence at the hearing from:

- [Omitted];
- The Respondent;
- [Omitted];
- [Omitted].

[19] This project was a 3 stage development under one building consent for the construction of a two-level free-standing detached dwelling (the house) and a three-level two-dwelling apartment building (the apartments).

[20] [Omitted] engaged the Respondent to do the block laying for the house and apartments and the brickwork only on the apartments. The Respondent agreed this was the scope of works. At issue in the hearing was the carrying out of and supervision of the brickwork on the apartments. There was no issue taken with the workmanship of the block laying work.

[21] In respect of the block laying work on the house, however, there was an alleged failure to provide a record of work.

[22] The Respondent said when the brick veneer was being laid on the apartment building, there were between two and eight people on site on any one day, and they ranged in experience from two to 20 years. The Respondent was on-site physically about three-quarters of the time, and he both carried out and supervised the work. He had approximately five to six other projects on at the same time.

[23] [Omitted] supplied the bricks and organised the building inspections. The Respondent's staff were responsible for sorting and selecting bricks and positioning the bricks around the site. [Omitted] said there was a datum or reference point for the brickwork, the carpentry team had done the set out for the windows, and the architect spent time lining up the bricks for the heights of the decks and that the Respondent was told to start on a particular column.

[24] The Respondent agreed he was told where to start, and the height of the decks were given to him but said no soffit heights were given. The Respondent said he decreased the mortar joints by about 1mm in order to achieve the architect's gauge height.

[25] [Omitted] of [Omitted] was engaged by [Omitted] and inspected the brickwork on two occasions and produced two reports dated 10 April 2021 and 9 June 2021, respectively. At the hearing, he confirmed the contents of those reports.

[26] [Omitted] stated that he was on site for approximately one to two hours for each inspection. He then explained his comment that 80% of the brick veneer had been

installed at the time of his June report. This assessment was done by calculating the number of bricks planned to be used, which was 10,000 and noting that approximately 8,000 had been laid at that point.

[27] The Board focussed on [Omitted]'s June 2021 report and went through some of the workmanship issues he had identified. (Document 3.1, Pages 28-29 of the Board's file).

Mortar joints poorly tooled, not smooth finished and not consistent in finish and appearance

[28] [Omitted] acknowledged that any brick veneer will have a reasonable amount of poorly tooled joints, but for him to mention it in his report, it must have been around 40-50% of the joints. He said they were located across all of the walls and that the Building Code requires the joints to be tooled smooth whether they are raked first or not.

[29] [Omitted] explained the specification originally required raked joints. However, the work was not acceptable, the solution was to have smooth joints, and at the same time, the mortar colour was changed to try to hide the discrepancies in the joints and to get closer to the colour of the bricks.

[30] The Respondent agreed that a change was made as outlined by [Omitted]. He said that over half of the brickwork had been done when this decision was made. He had to over-point the joints, and it was harder to do this than doing a smooth finish the first time.

Mortar joints not consistent in thickness

[31] [Omitted]'s report describes the mortar joints as having *"considerable variation, and a number that do not comply with the Acceptable Solution E2/AS1 Masonry, that is, between 7mm and 13mm."*

[32] The Respondent *"can't say why"* there was a variation. He explained that he used taut stringlines and set-out rods. The Board put to him that the explanation could be as set out in [Omitted]'s report – that is, the most fundamental procedure is to determine a datum and the thickness of the mortar joints over the full height of the height of the veneer, develop a storey rod that marks each course to work to, upon which a taut stringline is attached for each row of bricks to be laid. [Omitted] further stated in his report - *"I saw little evidence that this basic practice was adhered to…"* . (Document 3.1, Page 28 of the Board's file). In response, the Respondent said, *"maybe"*.

Holes in the mortar joints

[33] [Omitted] said it was very difficult to quantify these. Any veneer can get holes in the joint, but here there were certainly enough for him to raise a concern about it. He said further that the joints had not been filled with mortar as required by E2/AS1 9.2 Masonry Veneer and NZS4210, making them non-compliant.

[34] The Respondent said maybe some joints were not fully filled but that he would have thought these were spasmodic.

Bricks not laid in a straight line

[35] The Respondent was asked if he was happy with the workmanship, and he replied, *"most of it".* On being directed to the photographs annexed to [Omitted]'s report, the Respondent accepted the workmanship *"could have been better"*. He stated that he had required his team to redo some of the bricks. He could not say why the bricks were, in places, not in a vertical plane.

[36] The Respondent gave evidence that he discussed with [Omitted] that a very small percentage of the bricks were straight, most were bowed. [Omitted] l said that these bricks had been checked on other projects, and there was found to be only a 1mm variation over 10 bricks. [Omitted] discussed the trueness of the bricks with the Respondent and acknowledged that the Respondent had told him that the issue was with the quality of the bricks and not with his workmanship.

[37] [Omitted]'s view stated at the hearing was that if the bricks were not true, that does not impact on the ability to lay to a flat surface. Bricks are a natural product, and around 10 -15 % will have a slight bow in them. A good bricklayer would set these aside or accommodate it in their bricklaying. The *"unevenness of the vertical plane is due to poor laying".* [Omitted]'s comments reflected his written report, which stated-

> *"A combination of poorly formed mortar joints and poorly aligned bricks, and this veneer reflects the ability of the bricklayer to do his job in a professional tradesman-like manner, which he has fallen well short of."*

Bricks exceed acceptable alignment deviation

[38] [Omitted] said that he did not need to look very hard to see this issue. He pointed to a photograph annexed to this report which showed a 5mm deviation. His report stated –

> *"The tolerance table in NZS421`0 says a maximum of 3.0mm. There are numerous situations on this veneer that well exceed the maximum of 3.0mm."*

Bricks with surface defects

[39] The Respondent said that there were issues with the bricks being chipped when they arrived on site, and there was a lot of wastage. He had used this brick on other projects, and there had been only 10% wastage. The Respondent agreed with [Omitted]'s estimate of 54% wastage on this project. He said [Omitted] told him to use some of the defective bricks on a small part of a fence. [Omitted] disagreed that he had asked the Respondent to use defective bricks – except for one place on the western face where because of the trees, no one could have seen the bricks.

[40] The Respondent was shown a photograph annexed to [Omitted]'s report, which [Omitted] had labelled "Bricks laid with surface defects". In response, he said that if you were throwing out 1 in 5 bricks, there will be some slippage, and some will make it through to being used. He said 70% of the job was not like what was shown in the photograph. The Respondent said he did complain to the builder about it and that if he could have finished the job, he would have gone back at the end and fixed these issues.

[41] [Omitted]'s view was that a defective brick should not be laid, it should have been put aside, and if you see a laid defective brick, you should go back and fix it then. [Omitted] said a bricklayer should tell the builder that he would not take responsibility for defective bricks. It was [Omitted]'s opinion that it was much easier to fix such issues as you go. He said that you would also go round at the end of the job to check, and he would expect only about 4 bricks to need to be fixed in the whole job.

[42] [Omitted] was the bricklayer who did the brickwork on the house. He did not do any work on the apartments other than one remedial 1.5 m wide panel. In that instance, the bricks were sorted for him by [Omitted]'s team, and so he was only given non-defective bricks. He had no issues with the bricks, although he commented that it may have been easier for him as it was summer and the bricks were more porous. When the panel was removed for this remedial work, [Omitted] could not say if there was any loose mortar.

[43] [Omitted] did all of the brickwork on the house using the same bricks as the Respondent did on the apartments. He said that he experienced less wastage than the Respondent had on the apartments. There were bricks with chips and defects but it was easier to use them because there were more small spaces in which to make use of them. [Omitted] said it would be usual practice to notice damage and correct it as you go when the mortar is soft, and then it is an easier process.

<u>Record of Work</u>

[44] The Respondent confirmed that the last time they were on site was before [Omitted]'s report of 9 June 2021. [Omitted] agreed.

[45] The Respondent gave evidence that the brickwork started at or just after Christmas 2020 and finished in August 2021. The block laying for both the house and the apartments was completed in January 2021.

[46] The territorial authority file was obtained on 4 October 2022, and it did not contain a record of work from the Respondent.

[47] The Respondent said [Omitted] contacted his wife, and the record of work was sent to [Omitted] the next day. A record of work dated 28 February 2022 (Document 2.2.3, page 45 of the Board's file) was given to the investigator on 1 September 2022 and was sent to [Omitted] on 2 March 2022. [Omitted] agreed with this date.

[48] The record of work was not given to the Council, because the Respondent said it was his usual practice to always send it to the main contractor. He said that he was generally contacted by the main contractor when they wanted the record of work. When asked by the Board, the Respondent said that he did not know about the timing requirements for the provision of a record of work.

Board's Conclusion and Reasoning

[49] The Board has decided that the Respondent **has**:

(a) carried out and supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);

(b) 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.

Negligent work and supervision

[50] The Respondent both carried out and supervised building work – the brick veneer work on the apartment.

[51] 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*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[52] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[9]. 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 or, in other words, whether the conduct was serious enough.

[53] 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.[10] The test is an objective one, and in this respect, it has been noted that the purpose

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

[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 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

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[11]

[54] 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.*

[55] In terms of seriousness in *Collie v Nursing Council of New Zealand,*[12] 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.*

[56] In *Pillai v Messiter (No 2),*[13] the Court 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.*

[11] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[12] [2001] NZAR 74
[13] (1989) 16 NSWLR 197 (CA) at 200 adopted in various New Zealand superior court decisions.

[57] Supervise is defined in section 7[14] of the Act. The definition states:

> *supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*
>
> *(a) is performed competently; and*
>
> *(b) complies with the building consent under which it is carried out.*

[58] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992[15]. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the Court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

> *"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.*

[59] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:

(a) the type and complexity of the building work to be supervised.

(b) the experience of the person being supervised.

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[60] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

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[14] Section 7:
supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—
(a) is performed competently; and
(b) complies with the building consent under which it is carried out.

[15] *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

[61] The Board finds that the Respondent did supervise and carry out negligent building work. The Board accepts the evidence of [Omitted], and considers that the mortar joints and alignment of the bricks both in the vertical face and in the course line are outside the tolerances of NZS4210. Further, there was poor workmanship in the tooling of the mortar joints and the quality control of the selection of the bricks – there were an unacceptable number of defective bricks laid.

[62] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered 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.

Record of Work

[63] 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[16].

[64] Section 84 of the Act provides:

> *All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*

[65] Section 401B of the Act allows building work to be declared as restricted building work by Order in Council[17]. It only applies to building work that is carried out under a building consent.

[66] The Building (Definition of Restricted Building Work) Order 2011 was passed to establish restricted building work. Clause 5 of the Order stipulates:

> *5 Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
>
> *(1) The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
>
> *(2) This clause applies to building work that is—*
>
> *(a) the construction or alteration of—*

[16] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[17] *401B Order in Council declaring work to be restricted building work*

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.

(2) An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.

(3) The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.

(4) Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.

(i) the primary structure of a house or a small-to-medium apartment building; or

(ii) the external moisture-management system of a house or a small-to-medium apartment building; and

(b) of a kind described in subclause (3); and

(c) of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.

(3) The kinds of building work referred to in subclause (2)(b) are—

(a) bricklaying or blocklaying work:

(b) carpentry work:

(c) external plastering work:

(d) foundations work:

(e) roofing work.

[67] The apartments fell into the category of a small-to-medium apartment building. The Order provides a definition of that term:

> ***small-to-medium apartment building*** *means a building that—*
>
> *(a) contains 2 or more residential units or residential facilities; and*
>
> *(b) does not contain parts that are neither residential units nor residential facilities; and*
>
> *(c) has a maximum calculated height of less than 10 m.*

[68] The Order also defines maximum calculated height as:

> ***maximum calculated height****, in relation to a building, means the vertical distance between the highest point of its roof (excluding structures such as aerials, chimneys, flagpoles, and vents) and the lowest point of the ground.*

[69] The building in question, in the plans provided to the Board, was over 10 metres in height (11.92 m) when measured from the lowest part of the ground (SSL 42.39m) to the top of the roof (RL54.310). (Document 5.7, Page 2575 of the Board's file).

[70] On the basis of that definition, the building work comprising both the brick veneer work and the structural masonry block work on the apartment was not restricted building work.

[71] The Board noted that the record of work dated 28 February 2022, provided by the Respondent, included the brick veneer and block work for the apartment. However, there was no obligation to provide a record of work in respect of the work on the apartment.

[72] However, the block work carried out and supervised by the Respondent on the house does fall within the definition of Restricted Building Work as set out above. As such, there was a statutory obligation to provide a record of work in respect of that work.

[73] 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.

[74] 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.

[75] 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.

[76] 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".

[77] As to when completion will have occurred is a question of fact in each case.

[78] 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. The Respondent said that the block work was completely finished (both house and apartment) in January 2021. Completion of the house blockwork, therefore, occurred at the latest in January 2021. The Respondent agreed that his time on site finished with the brick veneer to the apartments around early June 2021. A record of work was not provided until February 2022 and then only to the main contractor. 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.

[79] 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.

[18] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[19] [2018] NZHC 1662 at para 50

[80] In this case, the Respondent gave evidence that as soon as he was asked for it. He gave the record of work to [Omitted], the main contractor.

[81] 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.

[82] Further, 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. What has been put forward by the Respondent is not a good reason.

[83] Accordingly, the Board finds that no "good reason" for the failure to provide a record of work has been established.

Penalty, Costs and Publication

[84] 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.

[85] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[86] 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.*

[87] 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 do have the

[20] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[21] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

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.

[88] There were no mitigating or aggravating factors, but the negligent work and supervision were at the lower end of the negligence scale. Based on the above, the Board's penalty decision is a fine of $2,000.

Costs

[89] 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."

[90] 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].

[91] 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.*

[92] Based on the above, the Board's costs order is $3,500, which is the Board's scale costs for a half-day hearing. The amount is significantly less than 50% of actual costs.

Publication

[93] 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.*

[94] 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.

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[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.

[23] [2001] NZAR 74

[24] Refer sections 298, 299 and 301 of the Act

[95] 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].

[96] 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.

[97] Based on the above, the Board w**ill not** order further publication.

Section 318 Order

[98] 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 $2,000.**
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(l)(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.**

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

Submissions on Penalty, Costs and Publication

[100] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **31 March 2023.** The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and

[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

consider those submissions prior to coming to a final decision on penalty, costs and publication.

[101] 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

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

Signed and dated this 13th day of March 2023.

Mrs J Clark
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.