

Before the Building Practitioners Board

	BPB Complaint No. CB26026
Licensed Building Practitioner:	Scott Nicholson (the Respondent)
Licence Number:	BP130078
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding

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:	8 February 2023
Decision Date:	13 March 2023

Board Members Present:

Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs F Pearson-Green, LBP, Design AoP 2
Mrs K Reynolds, Construction Manager

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), (c), (d) and (db) of the Act.

The Respondent **has not** 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 carried out or supervised building work in a negligent manner, in a manner that was contrary to a building consent, and carried out building work of a type that he was not licensed to carry out or supervise. He also held himself out as licensed to carry out or supervise building work of a type which he was not at that time licensed to carry out or supervise. The Respondent did not fail to provide a record of work.

- [2] The Respondent is fined \$2,500 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, and the matter will be published in Code Words. The Respondent will not be named in the publication.

The Charges

- [3] The hearing resulted from a Complaint about 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], Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) in respect of building work in relation to the installation of building wrap and windows and the application of Aluband tape;
 - (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he is not licensed to carry out or supervise (s 317(c) of the Act) in that he may have carried out or supervised building work that required a carpentry licence;
 - (c) 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) in relation to the installation of building wrap and windows, the application of Aluband tape and the failure to call for a pre-wrap inspection;
 - (d) failed, without good reason, in respect of a building consent that relates to restricted building work that he 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) in that he not provide a record of work for the restricted building work that he was licensed to carry out being roofing and wall cladding; and
 - (e) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he was not licensed to carry out or supervise (s 317(1)(db) of the Act) in that he may have held himself out as being licensed to carry out or supervise carpentry work.

Function of Disciplinary Action

- [4] 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.

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

- [5] 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.”

- [6] 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 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.

- [7] 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.

- [8] The above commentary on the limitations of the disciplinary process is 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

- [9] 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.

- [10] 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.

⁴ [2016] HZHC 2276 at para 164

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

Further evidence and submissions

[11] After the hearing, and at the Board's request, the Complainant provided a copy of the written closing statement, which she had read out at the hearing. The Board also requested that the Respondent provide better copies of some text messages produced at the hearing. The Respondent provided these as well as a further submission and further evidence. The Board has reviewed and considered them when reaching this decision.

Summoned Witness

[12] Mr [OMITTED] had been summoned to appear as a witness at the hearing, but no response to the summons had been received by the Board Officer, and he did not attend the hearing. At the commencement of the hearing, further contact details were obtained from the Respondent for Mr [OMITTED], and he was telephoned. Mr [OMITTED] joined the hearing by telephone partway through the hearing. The Board records that Mr [OMITTED] had not received the summons, it having been sent to an incorrect email address.

Evidence

[13] 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 that allow it to receive evidence that may not be admissible in a court of law.

[14] 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.

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

The Respondent

[OMITTED], witness for the Respondent

[OMITTED], Complainant, and homeowner

[OMITTED], homeowner

[OMITTED], building contractor

[OMITTED], project manager for the dwelling

[16] The Respondent stated that the business is run from their home and consists of himself and his wife with no staff. The core business is steel sheds, and they operate mainly in the Waikato. The Respondent is a welder with a construction steel

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

background. In his opening statement, he commented – *“tried our best – some learning in this.”*

- [17] This project was the construction of a habitable steel shed in [OMITTED], Auckland. The scope of work was described by Mr [OMITTED]. The Respondent was to provide just the shell of the habitable shed built to code so that the owners could then fit it out internally. Mr [OMITTED] explained that an architect designed the habitable shed, and the plans were provided to the Respondent.
- [18] The Respondent agreed with the scope as set out by Mr [OMITTED] and referred to the project as a habitable shed importance level 2. He was required to do the steel work only and produce a fully closed in shed with the E2 envelope complete. He did no internal work. The Respondent took the downpipes to the ground but did no drainage work for stormwater or sewer.
- [19] Concurrently, a separate contract was in place between the owners and Mr [OMITTED] for the construction of a separate residential dwelling. Mr [OMITTED] confirmed that he did not carry out or supervise any work on the shed construction. He was only engaged to do the internal fit-out work for the habitable shed.
- [20] The Respondent described his role as project manager of the construction crew. That crew initially included [OMITTED], a Licensed Building Practitioner. Mr [OMITTED] carried out and/or supervised the concrete slab, stood the steel frames and roof structure, the longrun iron to the roof and completed the metal wall cladding cavity system to the non-habitable end of the shed only. The Respondent said that Mr [OMITTED] failed to obtain a Council pre-pour inspection.
- [21] At this point of the build, the Respondent engaged a different crew of workers who took the project through to completion. This second crew consisted of [OMITTED], and three of his workers. The Respondent stated that he supervised Mr [OMITTED], and Mr [OMITTED] supervised his workers.
- [22] The Respondent gave evidence that the wrap and cavity system was constructed by Mr [OMITTED] and his workers under his supervision. In answer to a question from the Board, the Respondent said he was not aware that the building wrap and cavity system was carpentry work, and he said that he had done it several times and was accepted by Council.
- [23] The Respondent said that the job was completed and all Council inspections passed.
- [24] Mr [OMITTED] is a builder with 12 years of experience. He is not a Licensed Building Practitioner, and neither were his crew members – [OMITTED] and [OMITTED]. He said that his third worker, [OMITTED], was at one time a Licensed Building Practitioner, but he did not believe Mr [OMITTED] was licensed at the time of this job. Mr [OMITTED] said that, in any event, [OMITTED] was not comfortable being responsible for the job and did not want to and did not take on any supervisory role.

- [25] Mr [OMITTED] explained that when he arrived on site, the bones of the shed were up. He gave evidence that he was not aware at first that it was a habitable shed. Once he realised this, Mr [OMITTED] stated that he told the Respondent that the job required a Licensed Building Practitioner to supervise the work. Mr [OMITTED] was allegedly told by the Respondent, *“don’t worry, work under my licence”*.
- [26] Mr [OMITTED] and his workers clad a couple of sides of the shed, installed the flashings, joinery, gutters and spouting and rectified issues. Mr [OMITTED] understood that the Respondent was the supervising Licensed Building Practitioner.
- [27] The Respondent denies that Mr [OMITTED] did not know it was a habitable shed when he agreed to the job. He further stated that [OMITTED] was a Licensed Building Practitioner at the time of this job and that he had assumed Mr [OMITTED] would do the record of work for the metal wall cladding.
- [28] A workmanship issue which was explored at the hearing was the failure to apply proprietary tape/Aluband to the window head flashing as required by the building consent. (Document 2.1.64, Page 77 of the Board’s file).
- [29] Ms [OMITTED] said she contacted Mr [OMITTED], the previous builder, in order to obtain his record of work and that up until that point, she had had no contact with him. Mr [OMITTED] had left the site before the relevant work was done, but he flagged to Ms [OMITTED] a potential issue with the Aluband tape.
- [30] On 27 April 2022, Ms [OMITTED] sought from the Respondent a record of work recording the installation of the tape and photographs of the *“use of Proprietary tape/ Aluban [sic] on each of the windows and ranch slider doors”*, to provide to the Council as a cavity wrap inspection was not undertaken.
- [31] At a site meeting on 29 April 2022 with the Council it was noted –*“It also appears that a cavity wrap inspection has not been carried out. Compliance will need to be shown in this regard. No further inspections will be carried out until this issue has been resolved”* (Document 2.1.39, Page 52 of the Board’s file).
- [32] On 11 May 2022, at a site meeting, the Respondent, Mr [OMITTED], and his workers along with the Complainant and Council Inspector, released the sheets of cladding where the Aluband had not been applied to the head flashings above all the windows and ranch sliders on the shed. They then applied the missing tape, and the Council inspector undertook the cavity wrap inspection before the sheets of cladding were put back on the shed.
- [33] The inspection report states - *“Cladding has been installed however sheets were unscrewed to confirm head flashing tape, Cavibats, Window removed to sight(sic) flexible tape, penetration trade seals installed from inside with boot facing outside. Satisfied on reasonable grounds work complies with building code”* (Document 2.1.78, Page 91 of the Board’s file).

- [34] The Respondent, at the hearing and earlier in a response to the Investigator, acknowledged that this was a mistake. He stated that it was due to the contractor not correctly following his instructions, the mistake was rectified, and Council accepted the remedial work.
- [35] Mr [OMITTED] and the Respondent disagreed about responsibility for the missing Aluband. Mr [OMITTED] says he raised the Aluband tape as an issue with the Respondent. He did not accept that this was his crew's fault. He said that he had a lengthy conversation with the Respondent about it and allegedly was told by the Respondent, *"don't do flashing tape on head flashings"*. He further commented that the Respondent *"bullies you into it and is a crook"*.
- [36] The Respondent pointed to text messages between himself and Mr [OMITTED] and submitted that they showed he did not tell Mr [OMITTED] not to use the tape, but rather the opposite.
- [37] The messages from the Respondent said - *"Don't use that stuff...just flashing tape"* (Document 10.2.4, Page 748 of the Board's file) and *"Just looking back on our conversation, found what you were referring to. I never said not to use flashing tape on head's but we discussed the poly tape on back of paper, I said not to use that"* (Document 10.2.4, Page 750 of the Board's file). The messages were undated in the documents provided to the Board.
- [38] The email exchange between Mr [OMITTED] and the Respondent as regards the Aluband in a timeline states (document 10.2.1, Page 741 of the Board's file).
- (a) Referencing the Council's request for photos of the window install Respondent to Mr [OMITTED] on 27 April 2022 - *"Hey, see below, so any photos of window tape install?"*
 - (b) Mr [OMITTED] to the Respondent on 28 April 2022 - *"As for taping the head flashings? It's steel framing and there is no big lintal [sic] to nail or tape the head flashing to, so that would have been impossible to do."*
 - (c) The Respondent to Mr [OMITTED] on 28 April 2022 - *"Did you use window tape?"*
 - (d) Mr [OMITTED] to the Respondent on 28 April 2022 - *"yes can you not see it there."*
- [39] At the hearing, the Complainant closed by saying, if the work had been supervised properly, there would not have been any problems. Had [OMITTED] not raised the Aluband issue with her, she would not have known until weathertightness issues manifested themselves.
- [40] The Complainant further submitted, as recorded in her post hearing written document, *"the Respondent...has not provided control or direction, and oversight of the building work to an extent that is sufficient to ensure the building work is performed competently and complies with the building consent under which it is*

carried out...has tried to deflect the fault elsewhere...has not acted professionally as a licensed LBP, noting that he may not have had the appropriate licence to supervise the restricted building work. (Document 10.1, Page 736 of the Board's file).

- [41] In closing, the Respondent's wife, [OMITTED], reiterated that it was a small family business, and they tried hard to keep customers and shed contractors happy.
- [42] The Respondent said he had done 6 habitable sheds in total and had used his roofing licence for the restricted building work for all of them. When the Board put to him that the roofing licence may not allow supervision of building wrap, cavity system and window installation, the Respondent said that he did not know that.
- [43] When asked by the Board, the Respondent said he would have given the roof and wall framing record of work, but the Council did not ask for one. He also said in response to a question from the Board, that the pre-clad inspection was not called for because it was impractical due to the way they operate as due to the width of the building wrap and the spacing of the girts the building wrap would blow off by the time the Council get there.
- [44] In a post-hearing submission, the Respondent stated:

"Supervision i was on the site 4 times, I solely [sic] run around 30 jobs from just signed to almost finished build, the site was 1.5 hours drive. I spoke to [OMITTED] on the phone every day he was onsite. In hind site [sic] if I was there at the point in time they were installing head flashings this wouldn't have happened. But then I may as well do the job myself, its difficult to supervise when the people onsite think they know better and ignore the architectural details approved by Council, and instruction my me to us [sic] the flashing tape. What more can I do? I supply details, verbal instructions and site visits. [OMITTED] was supervised, he chose to ignore a detail, and instructions, why should I be punished for this?"

"I take every job i do with all the responsibility on me and if a error does happen I always make sure to remedy this, as I did in this case with myself going to site and putting the head flashing tape on....At the end of the day the head flashing tape was installed, the shed passed council consent. The clients have a good quality product" (Document 10.2 Page 740 of the Board's file).

Board's Conclusion and Reasoning

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

- (a) carried out or supervised building work in a negligent manner (s 317(1)(b) of the Act)
- (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act)
- (c) carried out (other than as an owner-builder) or supervised restricted building work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act), in that he carried out and supervised building work that required a carpentry licence; and
- (d) held himself out as being licensed to carry out or supervise building work or of a type that, at that time, he was not licensed to carry out or supervise (s 317(1)(db) of the Act)

and **should be** disciplined.

[46] The Board has decided that the Respondent **has not** failed, without good reason, in respect of a building consent that relates to restricted building work that he is to carry out or supervise, or 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) (s 317(1)(da)(ii) of the Act) in that he did not provide a record of work for the restricted building work that he was licensed to carry out being roofing and wall cladding.

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

Negligence

[48] The Board accepts that the Respondent's role in the build was as the supervisor. The question for it is whether the Respondent has been negligent or incompetent as regards his supervision of building work.

[49] Supervise is defined in section 7⁷ 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.*

⁷ 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.*

- [50] 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.
- [51] 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.
- [52] 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 1992⁸. 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."

- [53] The Board, in considering whether the Respondent has supervised building work in a negligent or incompetent manner also needs to have regard to the meaning of those terms. In *Beattie v Far North Council*,⁹ Judge McElrea provided guidance on their interpretation:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

⁸ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

⁹ Judge McElrea, DC Whangarei, CIV-2011-088-313

[46] The approach I have adopted recognises that the terms “negligent” and “incompetent” have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

- [54] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*¹⁰ as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [55] The conduct being investigated as allegedly negligent or incompetent was the failure of the Respondent as the supervisor of the building work to ensure a cavity wrap (ICA) inspection by the Territorial Authority was called for. Anyone can arrange a Council inspection, regardless of the licence they hold. The Respondent managed and supervised this project, and as such, he should have ensured the appropriate Council inspection was called for and took place. He did not.
- [56] Council inspections provide an independent review of the building work to ensure that it meets both the building consent and the building code. In this instance, a critical inspection was not called for, and the work was closed in. Subsequent investigations revealed that work which would have been inspected had not been completed in a compliant manner. If the required inspection had been called for, the non-compliance would most likely have been identified and rectified.
- [57] The further matters that the Board notified that it was investigating under section 317(1)(b) of the Act were the installation of building wrap and windows and the application of the Aluband tape. This was the non-compliant work that should have been identified at an inspection but was not because the inspection was not called. Building wrap and tape at windows is a critical element of the weathertightness system. A failure to carry out the building work in a compliant manner puts other building elements and the health of the home at risk.
- [58] As will be further discussed in this decision, the Respondent was not licensed to carry out or supervise the building work. The disciplinary provision, however, is not that a Licensed Building Practitioner has carried out or supervised restricted building work in a negligent or incompetent manner. Rather, the far wider statutorily defined term of building work is used. As such, the conduct comes within the disciplinary provision and, given the factors discussed, the Board, which includes persons with extensive experience and expertise in the building industry, finds that the

¹⁰ [2001] NZAR 74

Respondent has departed from an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Not Licensed to Carry Out or Supervise Restricted Building Work

[59] The building work was carried out under a building consent and, as such, certain elements involved restricted building work. Under section 84 of the Act:

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.

[60] Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) provides:

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—*

(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:*

[61] The Respondent is a licensed building practitioner with a Roofing – Profiled Metal Roof and/or Wall cladding licence. The work that the Respondent purported to supervise was the external wall building wrap, including associated flashing tape, cavity batten system and window installation. This is restricted building work as it relates to the external moisture management system of a residential dwelling.

[62] The Licensed Building Practitioner Rules 2007, promulgated under section 353 of the Act, gives guidance on whether the work in question comes within the competencies for the Respondent’s Roofing licence.

[63] In Schedule 1 of the Licensed Building Practitioner Rules, the competencies that make up the minimum standard for each licence class, and the performance indicators that the Registrar will have regard to when determining whether a

competency has been met, are set out. These currently cover the licence classes of Design, External Plastering, Site, Bricklaying and Blocklaying, Carpentry, Foundations and Roofing.

[64] The competencies for Area of Practice 2: Profiled Metal Roof and/or Wall Cladding state:

“4.2.1 Work safely at all times. May include but not limited to – personal safety and safety of others.

4.2.2 Manage environmental issues onsite. May include but not limited to – building waste and hazardous materials disposal, storage of materials and use of solvents, complying with the Resource Management Act requirements.

4.2.3 Confirm structure is prepared for work to begin. May include but not limited to – fascia, framing, substrate, valley boards, purlin spacings.

4.2.4 Undertake preparations for installation of profiled metal roof and/or wall cladding. May include but not limited to – determining fixing pattern, confirming underlay/support, and under flashings.

4.2.5 Carry out installation of profiled metal roof and/or wall cladding. May include but not limited to – loading roof materials on to work area, determining fixing pattern, marking and pre-drilling sheets, fixing roof and/or wall cladding.

4.2.6 Complete and finish metal roof and/or wall cladding. May include but not limited to – installing penetrations, installing accessories, measuring and installing flashings, cleaning swarf and debris from work area, and inspecting finished roof and correcting defects.”

[65] The building performance guidelines published by the Ministry of Business, Innovation and Employment state:

“Profiled metal roof ... confirm underlay and support, and under flashings...fix roof cladding”.

“In relation to walls, roofer LBPs can do or supervise the construction/installation of profiled metal wall cladding:

- Determine fixing pattern*
- Mark and pre-drill sheets*
- Fix wall cladding*
- Install penetrations*
- Measure and install flashings*
- Inspect finished roof and correct defects¹¹*

¹¹ LBP licence classes | Building Performance

[66] By way of contrast, the competencies for a carpentry licence, as set out in the same document state:

- “Walls and Columns carpentry licence*
- construct and erect framing*
- construct and erect internal linings and bracing systems*
- install pre-cast and pre-fabricated elements*
- erect some exterior claddings*
- construct and erect exterior joinery*
- construct and install penetrations and flashings*
- install facings*
- install scribes*
- install seals*
- form cavities*
- install profiled metal wall cladding”¹²*

[67] In considering whether the external wall building wrap, including associated opening flashing tape, cavity batten system and window installation work supervised by the Respondent, comes within the competencies of the Roofing licence, the Board places weight on the competency wording - *4.2.3 Confirm structure is prepared for work to begin* “ The use of the word “confirm” rather than “carry out” or “undertake” used elsewhere in the competency suggests that the carrying out and supervision of this work is not included within this competency.

[68] On the basis of the above, a licensed building practitioner with a Roofing – Profiled metal roof and/or wall cladding licence cannot carry out or supervise restricted building work, that is, the external wall building wrap, including associated opening flashing tape, cavity batten system and window installation.

[69] The Respondent supervised the work of Mr [OMITTED] and his workers in external wall building wrap, including associated opening flashing tape, cavity batten system and window installation. The Respondent gave evidence that he supervised this work and recorded that in his record of work. The Board, therefore, finds that the Respondent supervised restricted building work of a type that he is not licensed to supervise.

[70] The Board also notes, as outlined above, that the work the Respondent was not licensed to carry out was completed in a negligent manner. This, in itself, shows the importance of the licensing regime. Licensed Building Practitioners should limit themselves to restricted building work that they have been assessed as competent to carry out or supervise. The risks to the compliant construction of residential dwellings if they do not are manifest.

¹² LBP licence classes | Building Performance

Not building in accordance with a building consent

- [71] The non-compliant installation of the building wrap and windows and the application of the Aluband tape are the building work which was not in accordance with the building consent.
- [72] The disciplinary offence under section 317(1)(d), as with section 317(1)(b) discussed above, relates to the wider definition of “building work” and is not limited to “restricted building work”.
- [73] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established¹³.
- [74] Given the above, the Board finds that the building consent had not been complied with. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected and, as such, they will be treated as a single offence when the Board considers penalty.

Holding out as being licensed

- [75] The Respondent gave evidence that he considered that he was supervising this work under his roofing licence. Mr [OMITTED] gave evidence that the Respondent told him the work was being supervised under the Respondent’s roofing licence.
- [76] The Board, therefore, finds that the Respondent represented or held himself out as the person who could and would supervise restricted building work which the Board has found did not fall within the competencies of his Roofing licence. The disciplinary offence under section 317(1)(db) of the Act is upheld.
- [77] It is noted, however, that the findings of carrying out and/or supervising building and holding himself out as being licensed for, work of a type for which the Respondent is not licensed to carry out and/or supervise, are integrally connected and, as such, they will be treated as a single offence when the Board considers penalty.

Record of Work

- [78] 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 work¹⁴.
- [79] 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.

¹³ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

- [80] The Board discussed issues with regard to records of work in its decision C2-01170¹⁵ 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.
- [81] 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.
- [82] 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*¹⁶ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [83] As to when completion will have occurred is a question of fact in each case.
- [84] 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.
- [85] The Respondent provided a record of work dated 26 April 2022, which covered the supervision of “*Walls – Paper to walls with Cav Bat R*” (Document 2.1.56, Page 69 of the Board’s file). The Respondent should not have provided a record of work for the supervision of this aspect of the project, as has already been detailed, the Board has found that he should not, under his licence class have been supervising this work.
- [86] Therefore, the Board has not gone on to consider whether the record of work was given in a timely manner, as it is unnecessary.
- [87] However, the Respondent may have been required, as the Licensed Building Practitioner supervising the work, to have given a record of work for the wall metal cladding and profiled metal roof. This he can do under his roofing licence but is only required to do so to the extent this work was undertaken by Mr [OMITTED] and two of his crew. To the extent this work was undertaken by the third member of Mr [OMITTED]’s crew – [OMITTED], who was licensed at the time, the Respondent had no obligation to provide a record of work as he could not supervise that work.
- [88] The Board has previously explained that one Licensed Building Practitioner cannot supervise the restricted building work of another Licensed Building Practitioner.

“Reference to supervision in the context of records of work is to the supervision of persons who are not authorised to carry out restricted building

¹⁵ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁶ [2018] NZHC 1662 at para 50

work, i.e. non-licensed persons. A licensed building practitioner does not require supervision by virtue of their own licence – they are authorised to carry out restricted building work. Even if one practitioner was to consider that they were in overall charge of a building site and of the work being carried out under a building consent (such as where they hold a Site Licence) the wording “each licenced person...” in s 88 cannot be ignored.

The wording of the section is clear. The obligation is for each and every licensed building practitioner to provide a record of work for the restricted building work they carried out under a building consent irrespective of whether there may be another licensed building practitioner on site who may be providing overall supervision. Persons who provide a record of work for restricted building work that other licensed building practitioners have completed could be exposing themselves to potential disciplinary liability.”¹⁷

Penalty, Costs and Publication

[89] 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.

[90] 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

[91] 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*¹⁸ 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.

[92] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁹ 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

¹⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁹ 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.

- [93] The mitigating factors are that the Respondent acknowledged that he had learnt from this experience and he remedied the defect involving the Aluband tape. Aggravating factors are that the supervision of the work by a non-carpentry licence holder could have resulted in significant consequences but for the Complainant's somewhat fortuitous finding with respect to the Aluband tape. The Respondent's final submission suggested he failed to understand the significance of this work not being adequately supervised by the appropriate licence holder.
- [94] Balancing these factors, and with the primary offence being not licensed to carry out and/or supervise the restricted building work in issue, the Board's penalty decision is that the Respondent is ordered to pay a fine of \$2500. In coming to its decision, the Board has taken into consideration that there is a degree of commonality in the charges and findings. Because of this, the Board has taken a global approach to the penalty so that the Respondent is not penalised twice for the same offending.

Costs

- [95] 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."
- [96] 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 case²⁰.
- [97] In *Collie v Nursing Council of New Zealand*,²¹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- [98] *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.*
- [99] 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 moderate in complexity and involved a full-day hearing. Adjustments based on the High Court decisions above are then made.
- [100] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the

²⁰ *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.

²¹ [2001] NZAR 74

Board's scale amount for a full-day hearing of this type and is significantly less than 50% of actual costs.

Publication

- [101] 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 Act²². The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:
- [102] *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.*
- [103] 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.
- [104] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. 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*²⁶.
- [105] 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 interest²⁷. 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.
- [106] Based on the above, the Board **will** order further publication of this decision in Codewords for the education of the profession, but the Respondent is not to be named in such publication.

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁶ *ibid*

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[107] 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 \$2,500.

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 be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision. This decision will be published in Codewords, but the Respondent is not to be named in the publication.

[108] 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

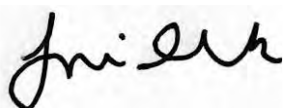
[109] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **14 April 2023**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[110] 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

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

Signed and dated this 22nd day of March 2023



Mrs J Clark
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.*