Before the Building Practitioners Board

	BPB Complaint No. 25993
Licensed Building Practitioner:	Neihana Pickering (the Respondent)
Licence Number:	BP 130992
Licence(s) Held:	Carpentry

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	Whangarei
Hearing Type:	In Person
Hearing and Decision Date:	15 December 2022

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

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

Contents

Summary of the Board's Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined $500 and ordered to pay costs of $500. A record of the disciplinary offending will be recorded on the public register for a period of three years.

[2] The Board also found that the Respondent did not carry out building work in a negligent or incompetent manner or in a manner that was contrary to a building consent.

The Board

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

The Charges

[4] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[2] to hold a hearing in relation to building work at [OMITTED]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;

(b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

[5] The Board gave notice that, in further investigating the above, the Board would be inquiring into:

(a) the quality and compliance of the piles installed for foundations and the cladding that was installed;

(b) whether required inspections were called for or were called for in a timely manner; and/or

(c) the process used for changes to the building consent as regards the cladding.

Function of Disciplinary Action

[6] 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

[1] Section 341 of the Act.

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

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[3] and in New Zealand in *Dentice v Valuers Registration Board*[4].

Inquiry Process

[7] 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.

Consolidation

[8] The Board may, under Regulation 13, consolidate two or more matters into one hearing but only if the matters are, in the opinion of the Board, about substantially the same subject matter and any complainants and the licensed building practitioner in respect of each complaint agree to the consolidation.

[9] The Board sought agreement for consolidation of this matter with complaint number CB25899, which led to this Board Inquiry. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

[10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[11] 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.

[3] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[4] [1992] 1 NZLR 720 at p 724
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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

Neihana Pickering	Respondent
[OMITTED]	Respondent in CB25899
[OMITTED]	Complainant in CB25899
[OMITTED]	Complainant in CB25899
[OMITTED]	Witness for the Respondent
[OMITTED]	Former Building Control Officer
[OMITTED]	Engineer
[OMITTED]	Engineering Technician
[OMITTED]	Engineer
Brian Cook	Building Control Officer, Whangarei District Council
Mark Sowry	Building Control Officer, Whangarei District Council

[13] Mr [OMITTED]'s company, [OMITTED] ([OMITTED]), a volume builder building some 50-60 homes per annum with an office staff that managed client builds, was engaged to construct a new residential dwelling for the Complainants. [OMITTED]'s staff, which included design, quantity surveyor and project management staff, developed the design, submitted the building consent and managed the construction process. [OMITTED] contracted the Respondent to carry out the carpentry aspects of the build. The Respondent took instructions from a [OMITTED] project manager ([OMITTED]), who interfaced with the Complainants. The Complainants, in turn, were informed that they were not allowed to engage directly with the Respondent.

[14] The Complainants had previously built with [OMITTED] and were complimentary about that build. During this build, however, issues of concern to the Complainants arose. They made a complaint about Mr [OMITTED]. When he replied to the complaint, he stated that the Respondent was the Licensed Building Practitioner responsible for the building work complained about. As a result, the Board resolved to initiate a Board Inquiry into the Respondent's conduct, and it resolved to further investigate the installation of foundation poles, which were alleged to be out of plumb, and issues with the cladding, which it was alleged had not been installed in accordance with the manufacturer's instructions.

[15] Mr [OMITTED]'s evidence at the hearing was that he was not involved in the building work and that his staff looked after the contract and the build without his direct engagement. He was involved with the resolution of contractual issues, which were eventually resolved with [OMITTED] purchasing the dwelling and on-selling it to Ms [OMITTED], an employee and shareholder of [OMITTED]. Ms [OMITTED] noted that a Code Compliance Certificate has not yet been issued but is being worked toward.

[16] The hearing focused on the Respondent's involvement in the building work.

Licensing

[17] The Respondent's licence was, for a short period of the build (17 April 2019 to 20 May 2019), suspended and, as a result, that he was not a Licensed Building Practitioner due to the provisions of section 297 of the Act.[6] The Respondent was aware of the suspension, which he stated was a result of his not being able to meet compulsory skills maintenance requirements. During the period when the Respondent's licence was suspended, he was not authorised to carry out or supervise restricted building work.[7] The evidence, however, established that the restricted building work that was complained about was not completed during the period of the suspension as the poles were installed on or about 3 April 2019, and the concrete to secure them was poured on 4 April 2019, prior to the suspension, and the cladding was carried out after the suspension was complete.

Poles

[18] The Respondent did the set out for the holes, and a digger was contracted to auger them. He noted that the conditions were difficult, with rain causing mud and making the site slippery, that there were no issues with the diameter of the holes but that it was difficult to keep them plumb. Added to this, he stated that the length of the poles (8 metres) and depth of the holes (3 metres) made their installation difficult.

[19] Various engineers were engaged to review the installation of the poles.

[20] On 3 September 2019, [OMITTED] Limited provided advice to [OMITTED], having carried out a survey. They noted:

> *It was found that that majority of the 250 SED poles were generally sloping in a downslope direction at 20-45mm/m with a single pile at 81mm.*
>
> And
>
> *The rotations observed are not large enough to significantly influence the demand on the poles. As the poles have been sized based on bracing requirements, we have no concerns regarding the gravity load carrying capacity.*

[21] On 4 October 2019, [OMITTED] provided further advice supported by calculations. Again, they noted:

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[6] **S 297 Effect of licensing suspension**
(1) A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.
(2) At the end of the period of suspension, the person's licensing is immediately revived (unless there is some other ground to suspend or cancel that person's licensing under this subpart).

[7] **S 84 Licensed building practitioner must carry out or supervise restricted building work**
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.

> *From the above comment we consider that the long term deflections due to the poles being out of plumb will be very minor and are of no structural concern.*

[22] The two opinions were provided by [OMITTED], Engineering Technician, BE(Civil)(Hons) and [OMITTED], Chartered Professional Engineer, BE (Civil), CPEng, IntPE(NZ), CMEngNZ.

[23] On 1 November 2019, Mr [OMITTED], a former Building Control Officer, reviewed the [OMITTED] opinions for the Whangarei District Council. He noted the building consent required compliance with clause B1 of the Building Code and that the consent specifically noted the builder was to "ensure the work is level, plumb and true to line and face". Mr [OMITTED] stated:

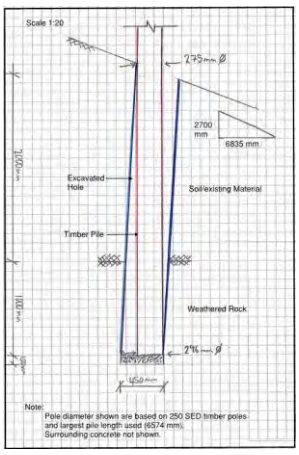
> *These items must be addressed by a suitably qualified Engineer in order to confirm the building has been constructed in accordance with the Approved Plans, Specification and associated documents …*

[24] On 9 June 2020, a further report was completed by [OMITTED] and [OMITTED] of [OMITTED]. It took the [OMITTED] opinions into account. It noted:

> *Seventeen of the twenty piles exceed the allowable construction tolerance. They are in the order of 5 times as much as recommended. It should be noted that a defect does not necessarily mean that it does not comply with the Building Code.*

[25] The report also noted:

> *With the pile hole dug with at a slight angle, the contractor would have sought to straighten the pole as much as possible. This was likely attempted by placing the toe of timber pole flat against the downhill side of the hole, and the top end leaning hard against the back of the hole. This type of placement is illustrated in Figure 2, and an example at the top is shown in Photo 7 in Appendix A.*



[26] The Respondent gave evidence that the scenario depicted above was what occurred on site. No consideration was given to broadening the holes to allow for greater adjustment of the poles in them.

[27] The [OMITTED] report concluded:

> ***7 Conclusions***
>
> *All of the piles lean downhill. Most of them have a tilt that is many times greater than normally accepted tolerances. People may notice this and it may be considered as a loss of amenity under the Building Code. The excavation for the water tank is within a zone that adversely affects the performance of two of the piles.*
>
> ***8 Recommendations***
>
> *It is recommended that a methodology be prepared by a Chartered Professional Engineer to undertake the following:*
>
> *1. A certain percentage of the piles be made vertical, this should include Pile 7.*

[28] The next review was completed by [OMITTED] and Chartered Professional Engineer of [OMITTED]. His undated opinion was a peer review of the [OMITTED] opinions. He stated:

> *To conclude, I have reviewed the letters and accompanying calculations provided by [OMITTED] and am satisfied that both the calculations and opinions offered are in accordance with sound engineering practice and judgement.*
>
> *I am further satisfied that the pole eccentricities as measured by [OMITTED], and the further development of these eccentricities due to reasonable overload or creep, will have no long or short term adverse effects on the performance of the dwelling. The pole stresses arising from the measured and expected eccentricities are within the allowable pole capacities as set out in NZS 3604.*
>
> *In summary I am satisfied that the subfloor as constructed is and will be in accordance with the clauses B1.3.1, B1.3.2, of the Building Act. That is, the house will maintain its structural integrity and amenity throughout it's 50 year design life.*

[29] On 13 November 2019, the Council wrote to [OMITTED] noting various issues including those with regard to foundation poles. The letter stated:

> *The foundation piles/poles as a product, are not considered to be defective.*
>
> *However the installation, plumbness and alignment of the foundation piles/poles, are not of an adequate standard and do not meet the*

> *requirements of the NZ Building Code. Neither are they in accordance with the approved building consent and plans. Instructions were also given from Council's building inspector to ensure these elements were plumb and braced appropriately, but these have not been followed.*
>
> *This element needs to be assessed and, if necessary, rectified. These issues will need to be addressed to the satisfaction of Council in a further engineering report.*

[30] The correspondence set out the requirements for the engineering report, and on 28 September 2020, [OMITTED] provided the report that had been sought. It stated:

> *Making the piles vertical is not a practical option as it would not be possible to excavate new foundations without prior removal of the dwelling. To avoid excavating new foundations, the current poles could be cut off and made vertical with a spliced member. However, this would sacrifice moment continuity of the piles, worsening the situation.*
>
> *Therefore, to provide the dwelling occupier with peace of mind concerning the out of plumb piles, and at [OMITTED]s request, [OMITTED] suggests that additional timber braces be installed. These should be fixed from the base of the middle pile row to the top of the front pile row as shown on the attached sketch and be detailed as per NZS3604 pile braces. Note that the proposed layout includes the reversal of the existing brace to Pile 7. The braces will provide restraint to the top of the poles, thus limiting the possibility of movement.*

[31] [OMITTED] provided updated plans that reflected the changes, and on 25 February 2021, the amended building consent plans were approved by the Building Consent Authority (Whangarei District Council). The Council file included all of the above-mentioned reviews and opinions.

[32] On 8 July 2021, the Whangarei District Council wrote to the Complainants. With regard to foundation poles, the letter stated:

> *3. Council has previously advised that on the basis of engineering advise it has received (which you have seen), that the poles are structurally sound, and compliant with the Building Code in that regard. That position has not changed.*

[33] The Complainants were still dissatisfied. They made a complaint to the Board on 30 November 2021 about Mr [OMITTED].

[34] The Respondent, at the hearing, accepted that he should have sought advice or taken action, including contacting the engineer when issues were experienced with the installation of the foundation poles.

Cladding

[35] The building consent specified ply and batten using Roseburg Cedar, a product the Complainants had selected and had sourced from overseas. When it arrived, it was assessed as being unsuitable. As an alternative, the Complainants sourced and supplied a Shadowclad product which they pre-painted prior to delivering it to site for installation. The building consent was not changed. Mr [OMITTED] stated that it would have been attended to a later point in time and that the change to the consent may have been overlooked by [OMITTED]'s quantity surveyor. Mr [OMITTED] stated he did not have any involvement in the change. The Respondent did not inquire into whether a change of product had been processed. The Respondent did not have any engagement with the Council. He did not call for the inspections. Mr [OMITTED] did.

[36] The Council witnesses gave evidence that the change would have required an amendment to the building consent meaning the change would have had to of preceded the associated building work. The building consent amendment was granted on 25 February 2021. It included an amendment for Shadowclad.

[37] The Shadow Clad product was a lap-joined product. The Respondent gave evidence that the batten set out was the same as the set out for the consented product (battens at 600mm centres) but that he experienced some creep in the sheets as they were installed, which resulted in some issues with the nailing. The Respondent further stated that he did obtain the manufacturer's specifications off the web before he carried out the installation.

[38] Mr [OMITTED], in his letter of 1 November 2019, with regard to the cladding, noted that the building work had preceded an amendment being granted and stated that if an amendment was granted that it was unlikely that the existing cladding would be approved as it had not been installed in accordance with the manufacturer's technical literature.

[39] On 13 November 2019, the Council wrote to [OMITTED] noting the issues with the cladding as:

> *The unauthorised cladding as installed, presents a number of issues and these are noted below form the visual inspection carried out:*
>
> - *A 9mm spacer was not used at sheet joints, therefore, expansion gaps at the laps are not achieved to the product manufacturers specifications. There are many variations of the sheet joint widths.*
> - *Panel or holding pins used at sheet joints, presumably to locate the sheets prior to fixing installation. These pins are on the exposed face of sheets, in the grooves etc. They have not been removed and the pin product durability is unknown for the corrosion zone?*

- *Sheet fixings closer than 23mm from the edge of the lap joint. This means that the sheet is fixed through the expansion lap – top face sheets*
- *Sheet fixings showing in the grooves at the lap joints on the bottom sheet laps. This appears to be in accordance with the manufacturers specifications in most places being 13mm minimum back from edge of the sheet and appear to be clear of the weather groove.*
- *Sheet fixings that could not be seen, seem most likely to be nailed through the weather grooves*
- *Some sheets/joints are out of vertical alignment and outside of manufacturers specifications. The horizontal flashing joint may not function as designed*
- *Shadow clad coating is not able to be confirmed particularly the lower portion and back of the product.*

It is Council's view that the cladding system has been poorly installed and does not meet the manufacturer's specifications for installation. It would be appropriate to get the product manufacturer to assess the installation and report their findings, including any need for remedial action.

[40] The Respondent stated that whilst he had some labourers assisting, he carried out the nailing of the sheets, that cut edges of sheets were painted with metalex, and that if he had used the wrong nails, then it would have been a mistake. The Respondent's involvement in the project came to an end prior to issues with the cladding being notified.

[41] Mr [OMITTED] stated that the cladding issues were rectified after [OMITTED] purchased the dwelling.

<u>Record of Work</u>

[42] The Respondent stated that he provides a record of work when he is asked for one, he was not sure what the state of the build was, and that he has not, as yet, provided a record of work as one has not been sought from him.

Board's Conclusion and Reasoning

[43] The Board has decided that the Respondent **has not** :

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

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[44] The Board has also decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other

than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act) and **should** be disciplined.

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

Negligence and/or Incompetence

[46] The Board reached its decision on the basis that whilst there were issues with the building work that the Respondent carried out, the conduct under investigation was not serious enough to warrant a disciplinary outcome.

[47] Negligence and incompetence are not the same. In *Beattie v Far North Council,*[8] Judge McElrea noted:

> *[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.*

[48] 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*[9] test of negligence which has been adopted by the New Zealand Courts[10].

[49] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level".* In *Ali v Kumar and Others,*[11] it was stated as *"an inability to do the job"*.

[50] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[12]. 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.

[51] 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[13]. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional

[8] Judge McElrea, DC Whangarei, CIV-2011-088-313
[9] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[10] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[11] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[12] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[13] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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[14].

[52] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[15] and be carried out in accordance with a building consent[16]. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[53] Turning to seriousness in *Collie v Nursing Council of New Zealand,*[17] 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.*

[54] There were four matters under investigation. The first was the installation of foundation poles. The second is the installation of cladding. The third is the processes used for changes to the cladding. The fourth related to calling inspections in a timely manner.

[55] Dealing firstly with the foundation poles, the evidence before the Board was that they were not installed plumb. There was a degree of deflection. Most leaned downhill. The engineering opinions, however, were that the issue would not impact the compliance or structural integrity of the poles and the Building Consent Authority accepted that advice. After the Respondent's engagement had come to an end, additional bracing was installed. The bracing was not installed to achieve compliance but to provide additional assurance to the Complainants.

[56] In terms of the cladding, again, there were issues. The cladding installed was not the consented product, and whilst the Respondent obtained the manufacturer's instructions, they were not strictly complied with. The Building Consent Authority noted various compliance issues, including the failure to obtain an amendment for the change of product. The Respondent had no involvement in the consenting process, was not the project manager, and had little engagement with the Complainants.

[57] With respect to inspections, the Board accepted that the Project Manager was calling for the inspections. The Respondent conceded that they were not called for in a timely manner.

[58] It was clear to the Board that the Respondent did depart from what the Board considers to be an accepted standard of conduct. In that respect, he has been

[14] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[15] Section 17 of the Building Act 2004
[16] Section 40(1) of the Building Act 2004
[17] [2001] NZAR 74

negligent. As noted, however, the Board also needs to consider how serious the conduct was and whether it was serious enough to warrant a disciplinary outcome.

[59] In *Sharman v New Zealand Association of Counsellors Inc* [2013] NZHC 3553, Chief High Court Judge, Justice Winkelmann, adopted the following statement:

> *… 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.*[18]

[60] The conduct under investigation in this matter was close to being serious enough, but, taking all of the circumstances surrounding the conduct into account, the Board decided that it did not reach the required threshold. The Respondent is, however, cautioned that, in the future, he needs to take more care. In particular, if issues such as those that arose with the installation of the foundation poles arise, he should seek advice from suitably qualified persons before continuing. In this instance, he was fortunate that the poles were still compliant. If they had not been, the implications would have been far more serious. Also, if changes to the building consent occur during the build, he must ensure that the building consent is also changed or that the appropriate persons are dealing with it.

Contrary to a Building Consent

[61] In a similar vein to the above, whilst all building work must be carried out in accordance with the building consent issued,[19] the Respondent's transgressions, in the particular circumstances of this matter, were not serious enough to warrant a disciplinary outcome.

[62] As pointed out above, the Respondent should take note once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

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[20].

[18] *Pillai v Messiter* (No 2) (1989) 16 NSWLR 197 (CA) at 200
[19] Section 40 of the Act
[20] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

[64] 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.

[65] The Board discussed issues with regard to records of work in its decision C2-01170[21] 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.

[66] 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.

[67] 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*[22] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

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

[69] In most situations, issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. Completion occurred when the Respondent ceased to be involved in the build in 2019 as he would not, after that date, be carrying out or supervising any further restricted building work. He has not, despite his involvement ceasing, provided a record of work. 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.

[70] The Respondent stated that he had not been asked for a record of work. He should note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

[71] 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

[21] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[22] [2018] NZHC 1662 at para 50

case will be decided by the Board on its own merits, but the threshold for a good reason is high. No good reasons were advanced or found.

Penalty, Costs and Publication

[72] Having found that one 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.

[73] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

[74] 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*[23] 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.*

[75] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[24] the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[76] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of $1,500, an amount which it considers will deter others from such behaviour. In this matter, the Board adopted a starting point of a fine of $1,000. The starting point was lower than usual based on the fact that it was a Board Inquiry about non-provision as opposed to a complaint about it.

[77] The Respondent outlined for the Board the development of his business and the changes he has made to his business practices since this matter took place. He noted that he has engaged a business mentor and that the Board's inquiry has had a significant mental impact on him.

[23] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[24] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[78] Taking the mitigating factors presented into account, the Board decided to reduce the fine to $500.

Costs

[79] 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."

[80] 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[25].

[81] In *Collie v Nursing Council of New Zealand,*[26] 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.*

[82] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,[27] the High Court noted:

> *[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
>
> *[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

[83] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex. Adjustments based on the High Court decisions above are then made.

[84] The Board noted the matter was a Board Inquiry and that the only charge that has been upheld was the record of work allegation. Ordinarily, costs for a half-day hearing would be in the order of $3,500. However, had the Board only investigated

[25] *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee,* HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.
[26] [2001] NZAR 74
[27] CIV-2011-485-000227 8 August 2011

the record of work matter, it would have dealt with it on the papers. As such, it reduced the costs $500 being the amount the Board would normally impose for such a matter.

Publication

[85] 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[28]. 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.*

[86] 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.

[87] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990[29]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[30]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[31]. 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*[32].

[88] 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[33]. 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.

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

[28] Refer sections 298, 299 and 301 of the Act
[29] Section 14 of the Act
[30] Refer sections 200 and 202 of the Criminal Procedure Act
[31] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[32] ibid
[33] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[90] 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 $500.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**
Publication:	**The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(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.

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

Right of Appeal

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

Signed and dated this 19th day of January 2023

M Orange
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.