Before the Building Practitioners Board

	BPB Complaint No. CB 25039
Licensed Building Practitioner:	Victor Prakash (the Respondent)
Licence Number:	BP 132679
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	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	13 June 2019
Decision Date:	23 July 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
Faye Pearson-Green, LBP Design 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.

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

Contents

Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

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

(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); 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) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

[2] 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

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

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].

[3] 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."*

[4] 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. It does not have any jurisdiction over contractual matters.

Evidence

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

[6] 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.

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

Victor Prakash	Respondent
[Omitted]	Witness, [Omitted]

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[8] The Respondent was engaged to carry out an alteration to an existing dwelling under a building consent. The building work included restricted building work which required the issue of a record of work.

[9] The Complainant raised issues with the build during it progress. On or about 19 October 2018 the Complainant brought the contractual relationship to an end as a result of those issues. A new contractor completed the building work. A complaint was made to the Board about the quality and compliance of the building work and about the Respondent's failure to provide a record of work. The complaint included copies of building consent authority (BCA) inspection records including an inspection record of 11 October 2018 which noted:

> ***General comments***
>
> *First floor*
> *2 x Lintels to existing windows require upgrading to 190x90*
> *Timber beam 290x90 has been over cut, this is shown on plans as an angle cut.*
> *All bracing BLH1s need to be installed.*
> *Shower wall requires new framing 90x45 sg8 h1.2 as per plans (old framing added)*
> *Steel portal pfc beam 230mm requires correct point load supports at each end.*
> ***Supports top plate from roof today as this is deflecting, reinstate Jack studs and support lintel load with double studs dispersing load in to ground floor blockwall until lintel is changed***
>
> *Ground floor*
> *Bottom plates require securing to slab, these are loose.*
> *Bracing hardware not installed*
> *Lintels to ground floor incorrect, refer a500 of plans, lintel missing to exterior block*
> *Steel beam point loads incorrect engage engineer*
>
> *Additional observations*
> *Blockwork requires remedial action, Inadequate around windows and no flintcote.*
> *Pressure plumbing required to be in compliant 200psi or 1500kpa*
> *Tek screws required to SED through joist plate.*
> *Please book site meeting next so inspector has ample time to inspect.*

[10] The inspection record was accompanied by photographs of the building work.

[11] The Respondent provided a written response to the complaint in which he noted it was a tricky project and that there were a few minor issues. He also noted that, with regard to the beams:

> *For the beams we had an engineer through to inspect but by the time we could rectify the issue which were couple of missing bolts and point loads the engineer wanted us to apply, we were no longer involved with the project.*
>
> *I apologise as being a LBP small issues like this shouldn't come up but I'm only human and small mistakes do happen.*

[12] At the hearing the Respondent stressed that the building work was not complete and that issues noted would have been attended to as the building work progressed. He stated that he had not called for the inspection of 11 October 2018 and that the building work was not ready for an inspection. [Omitted] did note that one of the Respondent's staff members did join the inspection after about 20 minutes and remained for its duration.

[13] The Board heard further evidence at the hearing with regard to the item noted in the BCA inspection record.

2 x Lintels to existing windows require upgrading to 190x90

The Respondent stated that the work was only temporary, and that the door was not a new door but a reused one that was only installed to allow the area to be closed off. [Omitted] noted that the small square block under the lintel was not acceptable. The Respondent stated that the work would have been removed and redone.

Timber beam 290x90 has been over cut, this is shown on plans as an angle cut

The Respondent stated the new lintel was only installed as a temporary measure to support roof loads and that it would have been removed and replaced prior to completion. [Omitted] noted that the notch reduces the depth from that which the engineer had specified.

Shower wall requires new framing 90x45 sg8 h1.2 as per plans (old framing added)

[Omitted] gave evidence that timber removed as part of the demolition of other parts of the build had been reused whereas the building consent required the use of new timber. The Respondent stated it was an existing wall and that nothing had been altered.

Steel portal pfc beam 230mm requires correct point load supports at each end.

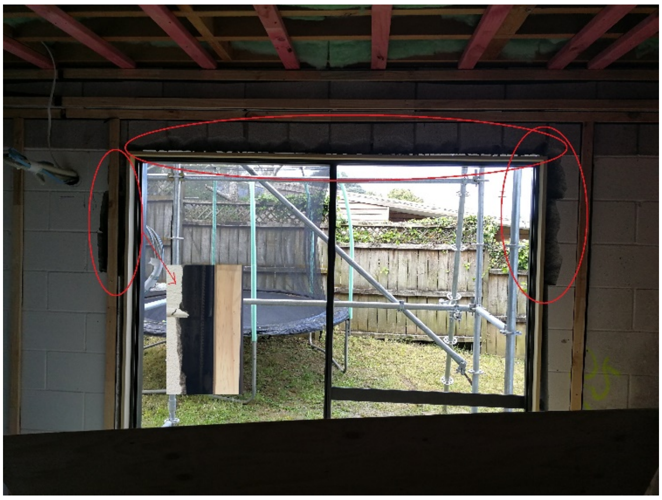
[Omitted] stated that the connections were not as per the engineer's specifications. The Respondent stated that the beam was not supplied with the correct holes and that he did correct it. It was noted that this conflicted with his initial response to the complaint. The Board also noted the fillet of wood that had been inserted under the beam. [Omitted] stated it should have been supported by a double stud. The Respondent again stated it was incomplete work.

Supports top plate from roof today as this is deflecting, reinstate Jack studs and support lintel load with double studs dispersing load in to ground floor blockwall until lintel is changed

[Omitted] noted that the above item was a critical safety issue and that it needed to be attended to as a matter of urgency and that the Respondent's employee was present when this was pointed out. The Respondent stated he could not attend to it as he was removed from site. The Respondent was not able to explain why the correct support was not installed at the time of the existing structure being demolished other than to say it was not complete.

Ground Floor Issues and Additional Observations

The Respondent's explanation for the issues was that the building work was not complete. The Board further investigated the issues with regard to the cut outs made for exterior joinery.



The picture to the left was representative of the work. The Respondent stated that a concrete cutter was engaged but that they were not able to cut within 300mm of the top of the concrete work and as such areas were chipped out. He also noted that window joinery was supplied too large and that additional blockwork was chipped out.

It was noted that areas some that had been chipped out were greater than 300mm from the top of the blockwork. It was also noted that reinforcing steel had been exposed as shown in the picture insert. The Respondent had not consulted an engineer to obtain directions as to how to rectify it and internal building work had been completed which would have compromised the ability to repair it.

Once again, the Respondent stated the building work was temporary and or incomplete and that it would have been attended to in the course of completion.

[14] The Respondent was questioned as to who carried out the work. He stated that it was done under his supervision by three qualified carpenters. The Respondent visited the site up to three times a day to check on the work and to ascertain what materials were needed.

[15] With regard to the record of work the Respondent stated that he has the record of work but has not provided it because he had not been asked for it and that his normal process was to provide a record of work at the end of the project.

Board's Conclusion and Reasoning

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

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

and should be disciplined.

[17] The reasons for the Board's decisions follows.

Negligence

[18] 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*[6] test of negligence which has been adopted by the New Zealand Courts[7].

[19] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test[8]. 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.

[20] 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[9]. 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 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[10].

[21] The Board notes that the purposes of the Act are:

> ***3 Purposes***
> *This Act has the following purposes:*

[6] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[7] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[8] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[9] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[10] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> *(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
>
> > *(i) people who use buildings can do so safely and without endangering their health; and*
> >
> > *(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
> >
> > *(iii) people who use a building can escape from the building if it is on fire; and*
> >
> > *(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
>
> *(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[22] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[11] and be carried out in accordance with a building consent[12]. 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.

[23] Turning to seriousness in *Collie v Nursing Council of New Zealand*[13] 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.*

[24] The Board was provided with extensive evidence of building work that had been completed below the standards to be expected to a licensed building practitioner. The Board did not accept the Respondent's evidence and submission that issues noted were either temporary or not complete. Nor did it accept that the submission that they were minor. The reasons were two-fold. Firstly, the submission that substantial building elements were installed in a temporary manner and would be deconstructed, and new elements installed defied logic. Items such as 290x90 beam which was incorrectly cut would have been supplied for the job, were expensive and had been installed in such a way that deconstruction would not have been practical and structural point loads were not constructed in order to meet the engineering requirements. Secondly the Board found the Respondent's evidence to be unreliable. He struggled to answer detailed questions and was vague in his responses.

[11] Section 17 of the Building Act 2004
[12] Section 40(1) of the Building Act 2004
[13] [2001] NZAR 74

[25] The Board also noted issue as regards the top plate deflecting and not adequately supporting the roof structure above it was an urgent issue that was not attended to notwithstanding the Respondent's staff being present and aware of the urgency of the issue.

[26] The Board notes that whilst the BCA inspection may have been premature the work had progressed in a manner whereby its compliance was called into question. It is also noted that the Building Consent Authority's role is to check that the building work has been carried out in accordance with the building consent. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not always follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

(a) whether there is any form of system or process to identify quality and/or compliance issues;

(b) the extent and seriousness of the non-compliance;

(c) whether there is a pattern of continued non-compliance; and

(d) what steps are taken when non-compliance issues are raised.

[27] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect during the first reading of changes to the Act around licensing[14] it was noted by the responsible Minister:

> *In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*

[28] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation[15]:

> *The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone*

[14] Hansard volume 669: Page 16053
[15] Hansard volume 669: Page 16053

involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

[29] Section 3 of the Act, which sets out the Act's purposes notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

14E Responsibilities of builder

(1) In subsection (2), builder means any person who carries out building work, whether in trade or not.

(2) A builder is responsible for—

(a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:

(b) ensuring that building work not covered by a building consent complies with the building code.

(3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—

(a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and

(b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.

[30] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

[31] Taking into account the matters in paragraph [25] the Board finds that there was no system or process in place to deal with noncompliance issues. The Board considered that the Respondent's intention was to simply continue with the work as it was presented in the BCA inspection records and to then deal with any issues raised if and when they were raised by the BCA. Such conduct is not acceptable. Even if this was not the case the building work should have been carried out in the correct manner from the outset. The aim should have been to get it right the first time.

[32] The Board accepted that the work was carried out under the Respondent's supervision. Notwithstanding the Respondent is still responsible. Supervise is defined in section 7[16] 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.*

[33] In C2-01143 the Board discussed supervision. It noted that ultimately the competence of the supervision provided will be reflected in the quality and compliance of the building work carried out under it. In this instance there was significant noncompliance.

[34] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

<u>Contrary to a Building Consent</u>

[35] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act.

[36] Unlike negligence contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence has to be established[17]. There was clear evidence before the Board that the building consent had not been complied with. As such the disciplinary offence has been committed.

[37] The Board does, however, note that there is an element of duplication in the finding of negligence and that of contrary to a building consent. This will be taken into consideration when considering the appropriate penalty to be imposed.

[16] 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.

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

Record of Work

[38] 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[18].

[39] 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.

[40] 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 …".

[41] 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. In this instance completion occurred when the Respondent's contractual engagement came to an end and other contractors took over as he would not, from that point on, be able to carry out any further restricted building work.

[42] A record of work has not been provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.

[43] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.

[44] The Respondent has stated that he had not realised the Complainant had been requesting the record of work. The requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations.

Penalty, Costs and Publication

[45] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[46] 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

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

opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[47] 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*[19] 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.*

[48] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[20]. The High Court when discussing penalty stated:

> *[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[49] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[50] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[21] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

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[19] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[20] [2012] NZAR 481
[21] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

[51] The Respondent has bene found to have been negligent and to have supervised building work that did not comply with a building consent. These are serious offences and the level of negligence and contravention of the building consent was high. Given these factors the Board considered that cancellation of the Respondent's licence may have been warranted.

[52] The Board did, however, note that that there was a commercial dispute and that this is the Respondent's first contravention of sections 3417(1)(b) and 317(1)(d) of the Act. The Board also notes the commonality in the disciplinary offending in the negligence finding and the finding as regards building contrary to a consent. As such it has treated those as a single offence. Given these factors the Board has decided that it will impose a period of suspension instead of cancellation. The Respondent's licence is to be suspended for a period of nine (9) months.

[53] The Respondent has also failed to provide a record of work. The Board's starting point for such an offence is a fine of $1,500. The Board sees no reason to depart from this starting point.

<u>Costs</u>

[54] 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."

[55] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case[22].

[56] In *Collie v Nursing Council of New Zealand*[23] where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

> *But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

[57] Based on the above the Board's costs order is that the Respondent is to pay the sum of $2,000 toward the costs of and incidental to the Board's inquiry.

<u>Publication</u>

[58] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act[24]. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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[22] *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee,* HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

[23] [2001] NZAR 74

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

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.

[59] 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.

[60] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[25]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[26]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[27]. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[28]*.*

[61] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest[29].

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

Section 318 Order

[63] For the reasons set out above, the Board directs that:

Penalty:	**Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of nine [9] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.** **And** **Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of $1,500.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**
Publication:	**The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.** **In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**

[25] Section 14 of the Act
[26] Refer sections 200 and 202 of the Criminal Procedure Act
[27] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[28] ibid
[29] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[64] 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

[65] 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 August 2019**. 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.

[66] 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 and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 23rd day of July 2019

Chris Preston

Chris Preston
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.