

Before the Building Practitioners Board

	BPB Complaint No. CB25393
Licensed Building Practitioner:	Joseph Russell (the Respondent)
Licence Number:	BP134866
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 Type:	On the Papers
Hearing and Draft Decision Date:	26 May 2022
Final Decision Date:	16 July 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Ms K Reynolds, Construction Manager
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.

Draft Disciplinary Finding:

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

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Summary of the Board’s Draft Decision

[1] The Respondent carried out building work in a negligent manner, in a manner that was contrary to a building consent and failed to provide a record of work on completion of restricted building work. He is fined \$2,000 and ordered to pay costs of \$1,500. A record of the disciplinary offences will be on the Public Register for a period of three years.

The Charges

[2] On 23 September 2020, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent. It resolved to proceed to a hearing to further investigate whether the Respondent had:

- (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, in that, changes to the consented building work may have been made without following an approved or correct process for the changes as noted in a Site Notice of 3 May 2019;

- (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, in that, changes to the consented building work may have been made without following an approved or correct process for the changes as noted in a Site Notice of 3 May 2019;
- (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.

- [3] The matter was set down for a hearing on 27 February 2021. The Respondent was sent a Notice of Hearing. On 21 January 2021, the Respondent emailed advising that email correspondence had been filtered as spam, that he was residing overseas, and that he sought an adjournment until April 2021, when he would most likely be able to return to New Zealand. He also requested further time to be able to consider and respond to the documentation received. The Board decided to adjourn the matter and directed that it was to be set down for a date that accommodates the Respondent's return, but if the Respondent does not return to New Zealand by July 2021, that the matter would be dealt with by way of the Respondent appearing by telephone or video conference.
- [4] The Respondent then informed the Board that he would not be returning to New Zealand by September 2021 and that he would be unlikely to return before 2022 and that he had documentation in New Zealand that he needed to access. The matter was further adjourned. The Respondent was asked to inform the Board of the date that he would be returning to New Zealand.
- [5] Notwithstanding that the Respondent states he is not in New Zealand, he has maintained a current practising licence as a Licensed Building Practitioner.

On the Papers Hearing

- [6] On 11 February 2022, a further enquiry as to the Respondent's plans to return to New Zealand was made. He responded that he did not have a return date.
- [7] On 4 March 2022, following New Zealand border opening announcements, the Respondent was once again asked to advise as to his intentions to return to New Zealand. His response was, "I don't have a date to return yet, will advise when I do".
- [8] In a Board Minute dated 16 March 2022, the Board expressed its concern about the delay in dealing with the matter, the Respondent's indeterminate plans to return to New Zealand, and the impact of the delay. The Board decided that it would proceed with the matter. Directions were issued as follows:

- (a) *The Board will provide the Respondent with an opportunity to provide further evidence and to respond to the matters set out in the Notice of Proceeding before it sets the matter down to be heard. The Respondent will have until 1 April 2022 to provide a further written response and any further evidence and/or submissions that the Respondent wants the Board to take into consideration.*
- (b) *The Board will then meet and make a decision on whether the matter should proceed on the papers or by way of a video conference hearing. The Respondent may, if he so requires, request that the matter be dealt with by way of a video conference hearing. If he does, then the matter will be set down as a video conference hearing.*
- (c) *A further link to the full copy of the complaint file is to be provided to the Respondent to allow him to provide further evidence or submissions and to prepare for a video conference hearing if one is required.*

- [9] On 26 May 2022, a committee of the Board met to further consider the matter in light of the above. It decided to make a decision on the papers. In doing so, it has been noted that the Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [10] On that basis, and taking into consideration the delay caused by the Respondent and the strength and weight of the evidence already in the file, the Board has decided that a formal hearing is not necessary. In essence, the Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [11] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Respondent and Complainant will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

Disciplinary Offences Under Consideration

- [12] As noted above, the Respondent's conduct that the Board resolved to investigate was that the Respondent had:
- (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, in that, changes to the consented building work may have been made without following an approved or correct process for the changes as noted in a Site Notice of 3 May 2019;
 - (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, in that, changes to the consented building work may have been made without following an approved or correct process for the changes as noted in a Site Notice of 3 May 2019;
 - (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.
- [13] The Complainant's raised a number of the concerns and issues which the Board decided it would not further investigate.

Function of Disciplinary Action

- [14] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [15] 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*,⁵ 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."

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 [2016] HZHC 2276 at para 164

[16] 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 persons⁶:

... 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.

[17] 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.

[18] 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.

Evidence

[19] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.

[20] The Respondent was engaged to carry out building work on renovations and repairs to a residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent’s building work started in or about August 2018 and came to an end on or about 13 May 2019 when the Respondent gave notice that he was ceasing his involvement with the work. A Notice of Practical Completion was sent. The Respondent claimed it was sent by his business partner and that it was withdrawn when notice of issues was given. A record of work has not been provided.

[21] The matters raised by the Complainant included:

5. *Failure to complete elements of the consented plans.*
7. *Failure to complete required site inspections.*
8. *Completing cladding, foundations and drainage works that has been identified by the BCC Inspectors of Wellington City Council (WCC) as inadequate.*

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

The WCC have presented solutions and issued instructions to the builders who have failed to do the required actions to remedy the incomplete inspections and inadequate works.

- [22] The Board obtained a copy of the building consent file from the Council. It contained the building inspection records, including a Site Notice dated 3 May 2019 that summarised on-site issues following a failed final residential inspection.

Passed Items	
Work in accordance with approved building consent	No, but being addressed
Work not part of the consent	Yes
Confirm any additional information/amended plan required	revised plan for changes to elevation north side with removal of deck, stairs and window changes required, also revised layouts for changes to laundry and upper addition of fireplace. Listed in documentation, to be taken as additional information
Failed Items	
Previous inspections passed and satisfactory	Block wall tanking not carried out for north block wall. Metal will need to be DUG out so inspection can be carried out.
	Also post clad weather tight inspection was not carried out. Access to lower roof to be provided and re inspection
Exterior	
Floor clearance (measure)	ground levels to west side to be dug down to meet Code requirements
Cladding sealed	additional weatherboard piece to be installed to bottom of walls to cover exposed framing
Window scribes	Some rustic plugs missing to window facings
Penetrations sealed	all penetrations to be completed and sealed properly
External cladding integrity	painting to be completed to all areas external
Vent cowls	vent cowls to east side to be swapped for hooded variety
Roof type (as per the consent)	weather tight inspection still to be carried out
Other (specify)	Change of under tile waterproofing from consent. Require confirmation of approval of change of product used from owner or owners agent
Other (specify)	"As-built" floor plan required as additional information showing the alteration to fixture locations from the consented plans
Other (specify)	revised plan for changes to elevation north side with removal of deck, stairs and window changes required, also revised layouts for changes to laundry and upper addition of fireplace. Listed in documentation, to be taken as additional information

[23] Subsequent inspections noted:

11 February 2020:

Block wall tanking inspection missed, as per building final inspection. Owner has dug out stones, No evidence of tanking installed only moleseal from todays visual inspection. Discussed with new LBP taking over work to satisfied WCC documentation is required (listed below) and visual inspection that the correct product is being installed.

Remedial works required

Block Wall Tanking inspection booked.

Cannot confirm approved product has been used - inspection failed.

Discussed on-site ROW from LBP to be on-site at next inspection covering all the works up to date. He stated home owners are trying to get this with help from lawyers. LBP has not signed off his ROW at this stage.

11 February 2020:

Site meeting to discuss stormwater termination either soak pit to be sized and designed by a Geotech engineer or charged line to street

[24] With regard to missed inspections, the Respondent stated:

As far as I'm aware all required inspections have been carried out. I can provide the documentation from the council if required.

[25] And, with regard to drainage and waterproofing, the Respondent stated:

The plumbing & drainage was a named cost, most of which was used by the Client for a full new roof and various other extras. The drainage across the rear of the building was unable to be installed in the manner designed and consented due to the client wishing for a door in the area as per the plans the contract is based upon, which differ from the plans the client has supplied in the complaint.

The waterproofing is there and unfortunately was missed off one of the inspections by the council. We have informed the client we are happy to remove the drainage metal in the area such that the waterproofing can be inspected.

[26] The Respondent provided a written response to the complaint. In it he noted he needed more time as he was trying to mediate a resolution, issues with mistakes he claimed the architect had made and changes made by the Complainant including insisting on a new roof and building work undertaken by other builders. He accused the Complainants of being litigious and of taking advantage of the situation. He made reference to an ongoing commercial dispute. In response to the specific issues

alleged by the Complainant noted in paragraph [21] above, the Respondent stated and submitted:

The build, as stated by the client, is not complete. They have applied for a final inspection knowing this and while conducting legal action in multiple forms against us. We are trying to sort this, but the client is unresponsive except through their lawyer. We are unable to perform any further work at the site until the dispute has been resolved.

Also, the contract is based upon a modified set of plans with less work to save the client money – him supplying the old plans to the Board, instead of the modified plans which the contract is based upon, is misleading.

[27] With regard to documentation, he stated:

Any and all documentation I had available for completed work, including receipts and warranty information was supplied to the client in mid June 2019, including myself offering to sign off the work I knew to be complete. This was replied to and stated that they did not believe the work complete and referring us to their lawyer such that mediation could occur and the issues could be rectified. That process is ongoing.

[28] The Complainant noted that the Respondent did not participate in the mediation and that a successful claim against the Respondent was made in the District Court.

[29] The Respondent, in response to the Board's request for further submissions, provided an email which stated, in relation to the allegations under section 317(1)(b) and the 3 May 2019 site notice:

-Unaware of any point at which this occurred that was not due to the safety of the worksite, building, or people working within.

-Breakdown in client relationship had already begun on the worksite and work was no longer continuing due to payment issues, as well as various inaccuracies from Mr. [OMITTED], and the job was considered ongoing.

-Building consent was issued and updates with the changes made onsite were to be updated by the client and their architect.

-Fireplace added by client.

-Job had been in limbo for months.

-Mr [OMITTED] will not respond to contact and therefore unable to access the site.

-Attempted communication has been ignored by Mr [OMITTED].

-Offered to provide a ROW on work I had supervised/conducted, but not for work that was unfinished, which was unfortunately most of the job.

-I could not provide ROW for work I had not seen due to a breakdown in relationship and being unable to visit the site.

-Mr [OMITTED] will not respond to contact and therefore unable to access the site.

[30] In terms of the record of work allegation he stated:

-Attempted communication has been ignored by Mr [OMITTED].

-Offered to provide a ROW on work I had supervised/conducted, but not for work that was unfinished, which was unfortunately most of the job.

-I could not provide ROW for work I had not seen due to a breakdown in relationship and being unable to visit the site.

-Some of the work being notified as sub-standard by the council caused concern for me as I did have complete trust in the builders working on site – two were ex building tutors whose work I considered very good, if a little slow, and [OMITTED], who is a good builder, was near to getting his LBP at the time and is now licensed. I would not provide a ROW without seeing the work completed correctly, which was made impossible due to Mr [OMITTED] ignoring communication.

-Mr [OMITTED] has never contacted me for a ROW.

Draft Conclusion and Reasoning

[31] 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);
- (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

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

Negligence

- [33] The finding of negligence relates to the Respondent's failure to ensure tanking was installed.
- [34] 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*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.
- [35] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹⁰. 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.
- [36] 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 Act¹¹. 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 practitioner¹².
- [37] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
- (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[38] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[39] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵, 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.

[40] The building consent file documented that a block wall tanking inspection had not taken place. Subsequent investigations revealed that tanking had not been installed. Tanking, waterproofing or weatherproof membranes are applied to below-ground walls to prevent water ingress (penetrating damp) and protect the interior. They are an important part of the external moisture management system and are necessary to ensure a building is watertight. The failure to install them can compromise a building. A failure to install is a clear breach of E2 of the Building Code (External Moisture). Over time, water ingress can also compromise structural elements contrary to clause B2 (Durability).

[41] The Respondent maintained that the tanking was in place. That was clearly not the case. The Board has noted that, as with other claims made by the Respondent, the weight of the evidence before it does not support his claims.

[42] The Board, which includes Licensed Building Practitioners with considerable knowledge and experience, has decided that the Respondent has departed from what the Board considers to be an accepted standard of conduct and has been negligent. Furthermore, the Board has decided that the failure was serious. It was not inadvertence. It was a clear failure by the Respondent and something that should have been identified prior to any backfill being installed.

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

Contrary to a Building Consent – Building Consent Changes

- [43] The Board’s findings relate to the failure to ensure all required building consent inspections were carried out as the build progressed and to changes made to the build without adhering to an acceptable process.
- [44] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code). All building work must also be carried out in accordance with a building consent. A consent includes the required inspections to be carried out under it to ensure compliance. Section 40 of the Act provides:

40 Buildings not to be constructed, altered, demolished, or removed without consent

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [45] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

49 Grant of building consent

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

- [46] 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 as set out above.

- [47] In *Tan v Auckland Council*¹⁶ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

¹⁶ [2015] NZHC 3299 [18 December 2015]

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

[48] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented can potentially put persons and property at risk of harm.

[49] Justice Brewer in *Tan* also noted:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[50] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[51] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[52] 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.

[53] There was clear evidence in the Council building consent records that mandated inspections had not been carried out as the build progressed and of changes that had been made to the consented building work without those changes going through the required process. With regard to missed inspections there was evidence that a block wall tanking and post clad weather tight inspection were not carried out. In terms of changes to the building consent, the records showed:

revised plan for changes to elevation north side with removal of deck, stairs and window changes required, also revised layouts for changes to laundry and upper addition of fireplace.

Change of under tile waterproofing from consent

"As-built" floor plan required as additional information showing the alteration to fixture locations from the consented plans

- [54] The Respondent did not put forward any reasonable explanations other than changes were made to save money. There was no evidence that any process had been used to make those changes.
- [55] It was clear to the Board that changes had been made to what was stipulated in the building consent, and that those changes had not been undertaken using any of the processes in the Building Act. Also, inspections had not been carried out as required under building consent. As they had not been conducted, and as the correct process for the building consent changes had not used, it follows that the building work was not completed in accordance with the building consent.
- [56] 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 established¹⁷. As such, the Board finds that the disciplinary offence has been committed.

Record of Work

- [57] 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 work¹⁸.
- [58] 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.
- [59] The Board discussed issues with regard to records of work in its decision C2-01170¹⁹ 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.
- [60] 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.

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

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

¹⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [61] 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*²⁰ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [62] As to when completion will have occurred is a question of fact in each case.
- [63] 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 matter, completion occurred in May 2019 when the Respondent issued a Notice of Practical Completion and ceased working on the project. 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.
- [64] The Respondent has referred to not being able to “sign off” the work. Providing a record of work is not “sing off”. It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability that would not otherwise exist as section 88(4) provides:
- (4) *A record of work given under subsection (1) does not, of itself, — create any liability in relation to any matter to which the record of work relates; or give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*
- [65] 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.
- [66] In this instance, there was an ongoing dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [67] The Respondent has also noted that he has not been asked for a record of work. He should note that the requirement is on the licensed building practitioner to provide a

²⁰ [2018] NZHC 1662 at para 50

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.

Draft Decision on Penalty, Costs and Publication

- [68] 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.
- [69] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [70] 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*²¹ 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.

- [71] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²² 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [72] The offending is the mid-range of seriousness. There was evidence of a disregard for regulatory requirements and procedures. On that basis, the Board adopted a starting point of a fine of \$3,000. The matter has been dealt with on the papers. A reduction in the penalty is warranted. The fine will be reduced to \$2,000. There are no other mitigating factors. The fine is set at \$2,000.

²¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [73] 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.”
- [74] 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 case²³.
- [75] In *Collie v Nursing Council of New Zealand*,²⁴ 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.*
- [76] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁵ 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.*
- [77] 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.
- [78] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar’s Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum

²³ *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.

²⁴ [2001] NZAR 74

²⁵ CIV-2011-485-000227 8 August 2011

for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[79] 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 Act²⁶. 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.

[80] 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.

[81] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁸. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁹. 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*³⁰.

[82] 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 interest³¹. 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.

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

²⁶ Refer sections 298, 299 and 301 of the Act

²⁷ Section 14 of the Act

²⁸ Refer sections 200 and 202 of the Criminal Procedure Act

²⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁰ *ibid*

³¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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(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.

[85] 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 Draft Decision

[86] The Board invites the Respondent and the Complainant to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[87] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **15 July 2022**.

[88] If submissions are received, then the Board will meet and consider those submissions.

[89] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

[90] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

[91] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required, then one will be scheduled, and a notice of hearing will be issued.

[92] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **15 July 2022**.

[93] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

Signed and dated this 22nd day of June 2022



Mr M Orange
Presiding Member

This decision and the order herein were made final on 16 July 2022 on the basis that no further submissions were received.

Signed and dated this 28th day of July 2022



Mr M Orange
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (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.*