

Before the Building Practitioners Board

	BPB Complaint No. CB25977
Licensed Building Practitioner:	Nathan Seator (the Respondent)
Licence Number:	BP 134931
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	Palmerston North
Hearing Type:	In Person
Hearing Date:	31 January 2023
Decision Date:	7 February 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design 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.

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 Decision

[1] The Respondent carried out or supervised building work in a negligent manner and in a manner that was contrary to a building consent. He also failed to provide a record of work on completion of restricted building work. He is fined \$3,500 and ordered to pay costs of \$3,500. The disciplinary finding will be recorded on the public Register for a period of three years.

The Board

[2] 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.

¹ Section 341 of the Act.

The Charges

- [3] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED], Palmerston North. 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.
- [4] The Board gave notice that, in further investigating the allegations under sections 317(1)(b) and 317(1)(d) of the Act, the Board would be inquiring into the matters raised in the reports of:
- (a) [OMITTED] dated 2 November 2021, (Document 2.1.83, Pages 316 - 319 of the Board's file);
 - (b) [OMITTED] dated 7 November 2020, (Document 2.1.29, Pages 241 - 265 of the Board's file); and
 - (c) [OMITTED] dated 25 March 2022, (Document 2.5.2, Page 361 of the Board's file).
- [5] Mr [OMITTED] passed away prior to the hearing. The Board expresses its condolences to his family.

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

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.

- [7] 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.”

- [8] 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.

- [9] 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 breaches the Code of Ethics for Licensed Building Practitioners⁷ (the Code) or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [10] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [11] 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

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

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

⁷ a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022 by clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

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.

- [12] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁸. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

- [14] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

Nathan Seator	The Respondent
[OMITTED]	The Complainant
[OMITTED]	Engineer
[OMITTED]	Licensed Building Practitioner, BP[OMITTED], [OMITTED]
[OMITTED]	Licensed Building Practitioner, BP[OMITTED]

- [16] The Respondent was engaged to carry out building work on an alteration to an existing 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 May 2019. The project is ongoing, and a Code Compliance Certificate has not yet been issued. The Respondent's involvement in it, however, came to an end in August 2020 when his services were terminated by the Complainant. A record of work was provided on 26 July 2021 after requests had been made for one by the Complainant but only for foundations. The Complainant alleged the record of work was not accurate in that it did not detail all that had been done by the Respondent.

- [17] The Respondent was not the only Licensed Building Practitioner involved in the building work. Mr [OMITTED] also provided services, initially through the

⁸ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Respondent as a subcontractor and then directly to the Complainant once the Respondent's involvement in the build came to an end.

- [18] There was a factual dispute over the extent of Mr [OMITTED]'s involvement in the build. The Respondent, both in submissions made prior to the hearing and at the hearing, maintained that Mr [OMITTED] was the Licensed Building Practitioner who was on site carrying out and supervising the work complained about (the non-compliant work) and that the Respondent spent very little time on the job once Mr [OMITTED] was engaged. Mr [OMITTED]'s evidence was that he supplied staff to the Respondent, who, in turn, was their supervisor until such time as Mr [OMITTED] took the job over.
- [19] The Respondent's time sheets supported Mr [OMITTED]'s version. The Respondent invoiced on a few occasions for time for Mr [OMITTED]. Conversely, the Respondent's invoices included a high number of hours throughout the project for the Respondent (before and after Mr [OMITTED]'s engagement) with the notation "building general".
- [20] Throughout the hearing, the Respondent's evidence tended to adapt to suit the position he was taking, and, in this respect, the Board preferred the evidence of the other witnesses.
- [21] Much of the Respondent's evidence, and the focus of his defence, was on changes which were made to the building consent after he became involved, which he stated were at his instigation. The Respondent noted that he had arranged for a new designer that he had worked with in the past to develop the changes and amendments. The Respondent's position was that those changes made engineer observations (noted in the consent as "Foundations, Veranda roof framing, kitchen ceiling/wall framing") and at least one Building Consent Authority (BCA) inspection (pre-line) stipulated in the building consent redundant. He maintained that position even though the amended building consent (which he stated was on-site) retained the same inspection requirements as the original consent. In short, he stated they were "not relevant" and should have also been changed in the consent amendment. The Respondent also took the position that it was not his job to get an engineer to inspect and that the designer should have been attending to that.
- [22] The Respondent also put forward that the designs, in certain areas, lacked adequate details. When the Respondent was asked what he would ordinarily do when a design lacks detail, he stated that he just builds what has been designed. Mr [OMITTED], in his report, agreed that the designs lacked detail and gave examples of this.
- [23] The Respondent also submitted that his work had passed inspections and was, therefore, compliant. Mr [OMITTED], in his report, noted:

Council inspection check lists form PNCC have been provided from inspections dated 19/06/2019, 02/03/2020, 19/05/2020, 22/07/2020, 12/10/2020 and

outline a large amount of non compliant works that have not been signed off or passed at inspections.

- [24] With respect to engineering observations, Mr [OMITTED] stated he was not called to review the building work as it progressed whilst the Respondent was the contractor. When he did review the work, he noted various compliance issues in an email:

As per discussion earlier I provide an update following todays site visit. Unfortunately it is not good news.

More investigation work is required to establish the extent of the existing foundations that we need to connect into for the proposed ply bracing. We are all at a disadvantage on this count as we have not seen any of the underlying structure in nay detail that would have been exposed during the previous construction work.

To start with [OMITTED] is going to try and get of copy of all council inspection photos which may be of help. James is going to remove a section of the deck exterior subfloor fascia boards on Monday so that we can crawl under the deck to inspect the extent of foundations from the outside. [OMITTED] will arrange to remove a section of deck roofing so that we can confirm how the deck roof structure has been connected into the house.

The following points are noted;

- The existing brick walls are not connected to the new timber stud wall framing as specified on the original drawings which required anka screw fixings at 600mm crs at all studs. - Inadequate stud tie downs at the end of all bracing walls have been provided and some appear to be missing - More robust stud tie downs will be required with the proposed new ply bracing*
- The connection of the gib ceiling diaphragm to the timber stud wall appears to be inadequate and is not as specified on the original drawings - Some bottom wall plates are not continuous and where discontinuous, do not have any connection details to provide any continuity especially where near to bracing stud tie downs. - some of the wall insulation has been poorly in stalled with gaps up against timber framing.*
- The connection and bracket plates around the perimeter of the deck at roof level are exposed to the weather and only appear to be HD galvanised brackets with HD galv bolts with no additional weather protection. This is unlikely to meet durability requirements of the building code. If being left exposed to the weather as has been done, then these should have been called up as being stainless steel.*

The above matters will be to be either checked out in more detail and/or be rectified. To provide more robust bracing tie down connections, sections of the floor will need to be lifted for construction access and inspection. The

perimeter of the ceiling will also have to be removed to allow a more secure connection to the wall framing to be provided.

In general, the workmanship is poor and some of the above deficiencies should have been picked during routine construction monitoring. It is also noted that the drawings for the amendments lacked detail, especially in relation to how some framing connections were to be made.

- [25] Mr [OMITTED] spoke to the issues noted above. He noted the issues should have been identified during his monitoring of the project and, because work had been closed in, he could not make adequate observations of various connections. The Respondent noted that the work had passed the related inspections.
- [26] The Respondent was asked why he did not engage Mr [OMITTED]. As noted above, his position was that the changes to the building consent meant Mr [OMITTED] was not required. It was put to the Respondent that, for example, both the original consent and the amended consent contained a diaphragm ceiling (the ceiling in the amended consent was larger than the original) and that the kitchen had not changed, and, therefore, it followed that engineering observations were still required. The Respondent maintained his position that they were not and that the amended plans completed by his designer contained new details which superseded the Engineer's design.
- [27] A failed BCA framing / Pre Wrap inspection dated 2 March 2020 noted:
- B1: Wall Bracing: 1.***
- No bracing installed at the time of the inspection*
- 2. Nathan stated another amendment will be applied for with the lounge dining room made bigger so the bracing will be changed*
- [28] The Respondent's evidence was that the bracing had not been installed because of the change that was being undertaken. The failed inspection, however, showed that the framing for the change had been completed in advance of the amendment for it, which was lodged on 24 March 2020 and approved on 6 May 2020.
- [29] The same occurred with a cladding change. Building work in relation to it preceded the related amendment. When this was put to the Respondent, he stated he was working under the direction of the designer and that he needed to close the property in to weatherproof it and to keep the project moving forward.
- [30] Mr [OMITTED] gave evidence as regards a report that he completed. The Report covered multiple items. The Board focused on those that would come within the definition of serious⁹. The aspects of his report that were investigated follow in italics:

⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

The plans show that the verandah is to be roofed which would require a flashing to be installed between the external cladding of the Home and running over top of the verandah roof. The flashing which has been installed by the Contractor is only suitable to be used as it currently fits to the timber rafters only, and no provision has been made to have this flashing fitted for the iron roofing. For a new roof flashing to be fitted the already installed flashing will need to be removed, timber weatherboards removed and a new correct flashing installed to the correct location to suit iron installation.

- [31] The Respondent stated he did not do this work. It occurred after he had left site.

Although steel head flashings have been installed to joinery heads on the weatherboards they have been installed as surface mounted rather than being rebated or checked in under the weatherboards creating a lower quality look to the Home. The flashings as shown also stop at the outer edge of the door/ window facing and are not continued past nor sealed where gaps are visible.

- [32] It was noted the work had not been completed as per the consented design. The Respondent stated that he would not normally complete the work the way it had been done, but he was doing the work to match to existing windows and that he had spoken to the designer about it. He also noted that he had done it the same way elsewhere, and it had been accepted by the BCA. The Respondent also noted that it was under a soffit and that he would normally pick any issues such as this at his inspections and that he would then rectify it. On this occasion, he had not seen it.

The verandah and room on the deck have been what appears to be built out of square and there is a noticeable variance in gap size running down the fascia boards which somehow will need to be filled or packed out to make straight. The fascia board runs up to 50mm out of align along one wall.

- [33] The Respondent stated that the existing building elements of the 140-year-old building were not square and that he did the best he could, and that he followed the lines of the house.

The joinery to the new room to be enclosed to the verandah has had framing built too large with which joinery will fall through the holes provided. As the external cladding has been installed to these areas they will now need to be removed and new weather boards installed once the window frame has been trimmed to the correct size. The joinery which has also been installed has not been installed adequately and is twisted in areas and out of plumb in others which also means the latches are not catching adequately (further adjustment is required).

- [34] The Respondent stated it was a possible misreading of the plans, the windows were only tacked in and that it was easier to make a widow opening smaller rather than larger.

It is now understood as of the 17th of December 2020 that the Contractor did not obtain an amendment from the council prior to installing the wet floor shower which was originally consented as an acrylic unit and the council has advised the client that the shower will need to be removed so correct inspections can be completed along with correct paperwork.

- [35] The Respondent stated that an amendment would have been filed at the end of the job by the designer to cover it.
- [36] With respect to the Respondent's record of work, he provided one for foundations in July 2021. He has not provided one for the balance of the restricted building work that he carried out or supervised. He stated that he was not sure, between himself and Mr [OMITTED], whose record of work should cover what. He did not take any steps to clarify who did what.
- [37] The Board obtained the Territorial Authority file. It did not contain a record of work from the Respondent.

Board's Conclusion and Reasoning

- [38] 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.
- [39] The reasons for the Board's decisions follow.

Negligence

- [40] The Board's findings relate to the manner in which building work set out in Mr [OMITTED]'s evidence was carried out and the manner in which window flashings were installed.
- [41] 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*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.

[42] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹². 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.

[43] 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 Act¹³. 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 practitioner¹⁴.

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

3 Purposes

This Act has the following purposes:

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

[45] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁵ and be carried out in accordance with a building

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁵ Section 17 of the Building Act 2004

consent¹⁶. 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.

- [46] 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.

- [47] As noted in the evidence, there were clear failings in how aspects of the build were carried out. The Respondent apportioned blame to Mr [OMITTED] and the designer and stated that it was passed by the Council, so there are no issues. That is not accepted by the Board. There were clear departures from acceptable standards and failures to adhere to building consent requirements. The Board finds that the Respondent was the Licensed Building Practitioner who was responsible and accountable for the work, not Mr [OMITTED].
- [48] Overall, the Board found that the Respondent's evidence was not credible and that he had what could be described as an "I know best" attitude toward the building work. The Respondent carried out the build in the manner that he considered best without reference to compliance documentation. Most significantly, he ignored the requirement for engineer observations. Those requirements were constant throughout the project and, had they been called for, many of the subsequent issues identified could, no doubt, have been identified and averted at an early stage.
- [49] 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.

Contrary to a Building Consent

- [50] The findings in relation to building contrary to a building consent relate to the failure to obtain the required engineering observations, a required council inspection and the failure to obtain consent changes prior to the related work being carried out.
- [51] 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. Section 40 of the Act provides:

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

¹⁶ Section 40(1) of the Building Act 2004

¹⁷ [2001] NZAR 74

- (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.*

[52] A building consent includes the conditions under which it is granted. Under section 222 of the Act, a Territorial Authority is entitled to carry out inspections of building work, and, in order for them to do so at appropriate times, they specify when they will carry out those inspections in a building consent. Those inspections then become a condition of the consent. Failure to comply with them is a breach of the consent.

[53] The Territorial Authority (Council) can also specify other means of ensuring compliance, such as the requirement to have an engineer observe work that has been completed. In this instance, the Territorial Authority specified three areas of the work where engineer observations were required.

[54] One inspection was not called for, and no engineer observations were carried out during the build as the Respondent did not call for them. The requirements were clear and did not change. Despite the Respondent's claim that they had been made redundant by changes to the build, the Respondent cannot unilaterally make that sort of decision. It was his responsibility to call for them and Council inspections, and he did not. Moreover, the work under the amendments had not changed to the extent that the Respondent claimed. Engineer observations were still required.

[55] Given the above, it follows that the Respondent has not built in accordance with the building consent.

[56] Turning to consent changes, 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.*

[57] 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.

[58] In *Tan v Auckland Council*¹⁸ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[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.

[59] 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.

[60] 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.

[61] 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.

[62] The Respondent, as the Licensed Building Practitioner, had a responsibility to make sure that any changes were dealt with in an 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.

[63] In this respect, section 45(4) of the Act states:

(4) An application for an amendment to a building consent must, —

(a) in the case of a minor variation, be made in accordance with section 45A; and

(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.

[64] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a

¹⁸ [2015] NZHC 3299 [18 December 2015]

building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

- [65] Building work on an increased living room, changed cladding, and a wet area shower were carried out prior to the building consent being changed to accommodate. As such, the Respondent has once again failed to build in accordance with the building consent that was issued.

Record of Work

- [66] 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 work¹⁹.
- [67] 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.
- [68] The Board discussed issues with regard to records of work in its decision C2-01170²⁰ 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.
- [69] 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.
- [70] 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*²¹ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [71] As to when completion will have occurred is a question of fact in each case.
- [72] 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 August 2020, when the Respondent’s engagement came to an end. A record of work was not provided until July 2021, almost a year later. It only covered foundations. The Respondent claimed the failure to provide a record of

¹⁹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²⁰ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

²¹ [2018] NZHC 1662 at para 50

work for other restricted building work had not been provided because he had to distinguish between what he did and what Mr [OMITTED] did. He took no steps to sort the issue and has not.

- [73] Records of work are simple documents. They merely record who did or supervised what in the way of restricted building work. Records of work are not compliance statements. Given that the Respondent invoiced for his work and was involved in it, he should not have been difficult for him to determine what he did or supervised.
- [74] The record of work the Respondent did provide was late. It was not provided on completion. A record of work has not been provided for all of the Respondent's restricted building work. No records of work have been provided to the Territorial Authority. 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.
- [75] 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.
- [76] In this instance, there was an ongoing dispute. Whilst it was not put forward as a reason, the Respondent should note that 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.
- [77] The Respondent should also 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.

Penalty, Costs and Publication

- [78] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [79] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[80] 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*²² 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.

[81] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²³ 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.

[82] The matters were serious, and there have been multiple disciplinary findings. The Board noted that the Respondent had not been found to have been incompetent. As such, restrictions on his licence were not warranted. A fine was therefore adopted as a starting point.

[83] The Board is mindful of the requirement to be consistent with penalties. On the basis of matters that have previously come before the Board, a starting point for the fine of \$3,500 was adopted. The Board is not aware of any mitigating factors. The Respondent’s overall approach to the building work and his cavalier attitude towards compliance requirements is an aggravating factor, but not one that the Board considers warrants an increase in the fine. It will remain at \$3,500.

Costs

[84] 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.”

[85] 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 case²⁴.

²² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

²⁴ *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.

- [86] In *Collie v Nursing Council of New Zealand*,²⁵ 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.

- [87] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²⁶ 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.*

- [88] 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.
- [89] The Board's scale costs for a half-day hearing of this type is \$3,500. There are no reasons to depart from that amount. As such, and based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry.

Publication

- [90] 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 Act²⁷. 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.

²⁵ [2001] NZAR 74

²⁶ CIV-2011-485-000227 8 August 2011

²⁷ Refer sections 298, 299 and 301 of the Act

- [91] 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.
- [92] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁸. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁰. 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*³¹.
- [93] 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 interest³². 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.
- [94] Based on the above, the Board will not order further publication.

Section 318 Order

- [95] 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 \$3,500.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
- Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(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.**
- [96] 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.

²⁸ Section 14 of the Act

²⁹ Refer sections 200 and 202 of the Criminal Procedure Act

³⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³¹ *ibid*

³² *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Submissions on Penalty, Costs and Publication

- [97] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **29 March 2023**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.
- [98] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 7th day of March 2023



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:*
 - (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.*