

Before the Building Practitioners Board

	BPB Complaint No. CB25168
Licensed Building Practitioner:	Ranjay Singh (the Respondent)
Licence Number:	BP 124205
Licence(s) Held:	Carpentry and Site AOP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	7 July 2020
Decision Date:	20 July 2020

Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)
Bob Monteith, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP, Design AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

Procedure:

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

Board Decision:

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

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Introduction

- [1] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at *[Omitted]*. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

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

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

[4] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[5] 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.

[6] The above commentary on the limitations of the disciplinary process are 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

[7] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

- [8] 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

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [10] 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.

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

Ranjay Singh	Respondent
<i>[Omitted]</i>	Industry representative for the Respondent
<i>[Omitted]</i>	Witness for the Respondent
<i>[Omitted]</i>	Engineer, <i>[Omitted]</i>
<i>[Omitted]</i>	Licensed Carpenter, remedial builder

- [12] The Board also summonsed *[Omitted]*, a Licensed Building Practitioner *[Omitted]*. He failed to attend. The Board will take further action as regard to that failure.

- [13] The Respondent was engaged to carry out building work on a new residential build 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 February 2017 and came to an end on or about 17 May 2018. A record of work was not provided until 12 July 2019. It was provided at the time of a code compliance certificate being applied for. *[Omitted]* noted that the Respondent did not follow through on promises to provide a record of work prior to it being provided. The Respondent stated he provided one when he was asked for it.

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

- [14] The Respondent's engagement in the project came about by way of him being contracted as a labour only carpenter by *[Omitted]* of *[Omitted]* who had contracted to carry out part of the build for clients. It was apparent to the Board, at the hearing, that *[Omitted]* was the principal contractor when the Respondent was involved in the project and that he was directing how the building work would be carried out. *[Omitted]*, who appeared as a witness for the Respondent, provided a written witness statement. He noted that his decision to engage the Respondent was in order to keep costs down. The Respondent noted in his opening that his fees are average in Auckland.
- [15] The extent of the Respondent's engagement was to carry out foundations, timber retaining wall, concrete slab, timber frame, window installation and weatherboard cladding.
- [16] It was a complex build on a difficult sloping site. *[Omitted]*'s witness statement noted that there were delays caused by design and engineering issues and changes. *[Omitted]* submitted that the on-site issues the Respondent was alleged to have been responsible for were the result of design and engineering issues.
- [17] *[Omitted]* of *[Omitted]* was contracted by the owners to complete finishing work. *[Omitted]* and *[Omitted]* were, for a short period in or about April 2018, both working on site. At this time, the Respondent stated that he was experiencing personal issues and had moved to Hamilton. This impacted his ability to complete the building work that *[Omitted]* had contracted to do. It was agreed that *[Omitted]* would take over and complete *[Omitted]*'s portion of the build. *[Omitted]* stated that *[Omitted]* had to also carry out remedial work on the building work that the Respondent had carried out. *[Omitted]* estimated that the owners had spent an additional \$133,000 on the remedial building work. *[Omitted]* brought the complaint to the Board. *[Omitted]* contributed to those costs.
- [18] Turning to the matters complained about, the complaint noted "everything from slab and floor heights off ... walls not plumb ... over exposed timber ... concrete pillars poured with insufficient cement ... beams installed with no cantilever ... junction details wrong ... steel beams not done to plan, hollow concrete blocks". The Complainant stated, "The house and building techniques are some of the worst I have seen and I believe this LBP should not have a licence".
- [19] The Respondent initially responded to the complaint by stating that he had not completed all of the work that was complained about and that some items were unfinished. He noted that the intention was to return to finish the work, but that *[Omitted]* took over responsibility for remediation and completion. He stated that it was only after the new builders took over that the Council and engineers started to blame him for issues noted. The involvement of *[Omitted]* with regard to a block retaining wall was noted.
- [20] *[Omitted]* provided a written statement recording his observations. He noted:

My first encounter with Mr Ranjay Singh was 2 weeks earlier than our start date on a Saturday at the address, he was filling fully built front entrance block columns 600 x 600 mm x 8 meters high, I asked if they had, had council inspection, he replied no, and he was filling them with gap 7 and some cement mixed all on the ground, and being bucketed up and in, these columns were demolished once i informed council and footings pulled out and built to plain ,as they would have collapsed and caused danger to life, that was our first encounter

over the period of 4 weeks, I found that the building had been built out of level front to back by 58mm side to side by 34 mm walls were out of plumb by 15mm over 3 meters , the house had not been braced correctly

ceiling strapping in the main lounge area not in line, stair well areas not lining up from ground floor to the top

block work filled with concrete overseen by Ranjay, were not pored correctly and hollow in numerous places, I contacted a mobile X-ray company to check all block work ,and there finding were grim, we contracted grouting services to remedy at great cost to the client

on checking the plans to the concrete dockets supplied by Ranjay, we found that the wrong strength concrete was ordered and placed in the mid floor and concrete lintels

over 80% of all the steel work supervised by Ranjay was incorrect, and required fixing, garage door lintel heights incorrect by 200mm, steel fixings into concrete failing due to incompetence it is my view that Mr Ranjay Singh was totally out of his depth in reading structural drawings and completing building work on contacting the architect [Omitted] from [Omitted], for a site visit to go over all the faults he and his team were horrified we have now completed the project

I have attached a cost of faults in XL passed on to the Client showing the Ranjay Singh ,has cost he client \$133.807 to remedy his faults to date

[21] A failed IFG – Framing inspection carried out on 18 December 2017 noted:

- 1. WF - Lintels fixing / uplift: Be tailored b3 fixings to complete*
- 2. WF - Timber beams and fixings : To complete not as per plan*
- 3. WF - Steel beams and fixings: To complete not as per plan*
- 4. WF - Engineer observation: To be provided at the next inspection*
- 5. VARMINOR - On site minor variation: Change in beam connections*

[22] A failed IFG – Framing inspection carried out on 13 April 2018 noted:

1. SCOPE - Scope: Partial Inspection
2. WF - Engineer observation: To be provided at the next inspection
3. MF - Engineer observation: To be provided at the next inspection
4. VARMINOR - On site minor variation:
5. VARPROCEED - Received Decision:

[23] A further IFG – Framing inspection was carried out on 26 April 2018. It noted:

Site Issue.

1---three front entry concrete block columns filled with gravel.

Engineers report required

2--block base east face ,exposed steel and hollow cores.

Engineers Report required.

3--Jay Frames-- timber report required.

4--concrete docket required for all deliveries.

5---tail connection lower apron roof missing.

Architects revision required

6---Steel post by front door to be completed as plan at base

7--basement framing needs full check

[24] A failed IFG – Framing inspection carried out on 6 June 2018 noted:

Outstanding as follows.

1. The hollow front block columns have been torn down and rebuilt.

2. J frame report not on site.

3. The hollow blocks in the lower levels are yet to be remedied with sika grouting specialists.

4. Steel angles to overhanging frames are not yet installed.

5. Basement framing wants recheck

6. All structural steel and connection changes including all damaged and broken block work solution is yet to be viewed to amended plans

7. Welding certificate

8. Concrete docket.

9. Multiple structural issues - garage portal is too low and is to be raised.

--There are 62 changes to structural elements in the project, Apply for formal amendment--

[25] The Board was provided with photographs of various failed items including the following showing blown steel beam to block connections and gravel in columns



- [26] The evidence before the Board also included detail showing that an insitu concrete beam to the garage was to be poured with 30Mpa concrete but that 25Mpa was used, that the wrong mesh was used in suspended slab in that se72 was used instead of se82.
- [27] A report from [Omitted], the engineers to the build, noted 69 construction defects to be resolved from the time when the Respondent was involved in the building work. The Council required an amendment to deal with those matters.
- [28] The Respondent noted that during the build, the engineers were inspecting and passing the work as acceptable but that it was only after he ceased to be involved that they started to note issues. The Respondent also noted that the Council did not raise any major issues with him during the build.
- [29] In general, [Omitted]'s evidence supported that which was noted in the failed inspections. The Respondent, in general, denied responsibility and or stated that it was incomplete work that would have been remediated or had become the responsibility of [Omitted] to rectify and or complete.
- [30] The Respondent gave evidence that he had up to four workers on the site with him. He was not carrying out work but was instructing them. The workers were not trade qualified but had worked with him in the past. They were in New Zealand on work visas.
- [31] [Omitted] stated that he supplied the materials. The Respondent stated that he installed whatever was supplied. No checks were carried out to ensure the materials complied with the building consent.
- [32] The Respondent submitted a written closing statement after the hearing had concluded. It reiterated the evidence he had raised at the hearing.

Board's Conclusion and Reasoning

- [33] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent **and** incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
 - (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.
- [34] The reasons for the Board's decisions follows.

Negligence and/or Incompetence

- [35] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent and incompetent manner (s 317(1)(b) of the Act) and should be disciplined.
- [36] The finding relates to the Respondent’s supervision of non-licensed persons.
- [37] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁷ Judge McElrea noted:
- [43] Section 317 of the Act uses the phrase “in a negligent or incompetent manner”, so it is clear that those adjectives cannot be treated as synonymous.*
- [38] 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.
- [39] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*¹⁰ it was stated as “*an inability to do the job*”.
- [40] The New Zealand Courts have stated that assessment of negligence and or incompetence in a disciplinary context is a two-stage test¹¹. 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.
- [41] 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 Act¹². 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 practitioner¹³.
- [42] The Board notes that the purposes of the Act are:

⁷ Judge McElrea, DC Whangarei, CIV-2011-088-313

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 *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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 at p.33

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

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.*

[43] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁴ and be carried out in accordance with a building consent¹⁵. 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.

[44] There was substantial and detailed evidence of very serious non-compliant building work by way of the Council inspections, engineering defect list, and the evidence from *[Omitted]*. The Respondent's evidence conflicted with that of *[Omitted]*. *[Omitted]*'s evidence was supported by the Council documentation. The Board did not find the Respondent to be a credible witness. His responses to questions were vague and inconsistent. The Board does not accept his evidence that the work was incomplete or that it would have been rectified by him. It was clear that he was not fully aware of what was occurring on-site and was not ensuring that non-compliant building work was identified and dealt with, as noted by the repeated failed inspections.

[45] The Council's role is to check that the building work has been carried out in accordance with the building consent. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not always follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

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

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

- (b) the extent and seriousness of the non-compliance;
- (c) whether there is a pattern of continued non-compliance; and
- (d) what steps are taken when non-compliance issues are raised.

[46] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect during the first reading of changes to the Act around licensing¹⁶ it was noted by the responsible Minister:

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

[47] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁷:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

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

¹⁶ Hansard volume 669: Page 16053

¹⁷ Hansard volume 669: Page 16053

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

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
 - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates;*
 - (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
 - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act;*
and
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[49] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from. This was clearly not occurring.

[50] The Board notes that the Respondent was supervising. Supervise is defined in section 7¹⁸ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

[51] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, but ultimately the Board also needs to consider whether the work met the requirements of the

¹⁸ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

building code and if not the level of non-compliance. In this instance, there was a very high level of non-compliance.

- [52] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁹. The definition of supervision in that Act is consistent with the definition in the Building Act and as such, the comments of the Court are instructive. In the case Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

- [53] As noted above, the Respondent was ignorant of the building consent failures that were occurring on site. He failed, in a very fundamental way, in his duties as a supervisor. The on-site issues would have been patently obvious. Immediate action should have been taken as some matters posed an immediate risk to the health and safety of others. No action was taken. The Respondent allowed the build to continue and issues to accumulate and compound.
- [54] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has both departed from what the Board considers to be an accepted standard of conduct and that he has failed to display skills required to be a licensed building practitioner. The Board further finds that the Respondent’s conduct was sufficiently serious to warrant a disciplinary outcome.

Contrary to a Building Consent

- [55] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. 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.

¹⁹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- (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.*

- [56] 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.
- [57] 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.
- [58] If changes are made to what is stipulated in the building consent, and the correct process for the change is not used then the building work can be said to have not been completed in accordance with the building consent. Unlike negligence, contrary to a building consent is a form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence must be established²⁰.
- [59] The Council inspection records note an accumulation of matters that required minor variations. Additionally, and more importantly from the perspective of the Respondent's conduct, the Council inspections records show that there was extensive building work that had been completed under the supervision of the Respondent which did not comply with the building consent.

Record of Work

- [60] 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 work²¹.
- [61] 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.
- [62] The Board discussed issues with regard to records of work in its decision C2-01170²² and gave guidelines to the profession as to who must provide a record of work, what

²⁰ *Blewman v Wilkinson* [1979] 2 NZLR 208

²¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²² *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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.

- [63] 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.
- [64] 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*²³ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [65] As to when completion will have occurred is a question of fact in each case.
- [66] In most situations’ issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. Completion may occur when a Licensed Building Practitioner ceases their engagement and will not be able to carry out or supervise any further building work. That is what occurred in the present case in May 2018. A record of work was not provided until July 2019 notwithstanding requests having been made for it.
- [67] The Respondent should note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [68] On the basis of the above, the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [69] 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. There were no good reasons.

Penalty, Costs and Publication

- [70] 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

²³ [2018] NZHC 1662 at para 50

the Respondent should be ordered to pay any costs and whether the decision should be published.

- [71] 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

- [72] 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*²⁴ 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.

- [73] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²⁵. The High Court when discussing penalty stated:

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

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

- [75] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁶ 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

²⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁵ [2012] NZAR 481

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

advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [76] The Respondent has committed three disciplinary offences. The Board does, however, note the commonality in the disciplinary offending in the negligence/incompetence finding and the finding as regards building contrary to a consent. As such, it will treat those as a single offence.
- [77] The most serious matter before the Board is the finding of incompetence. As noted above incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. The licensing regime is predicated on licensed building practitioners holding those abilities and the requisite skill and knowledge. The path to becoming licensed involves an assessment of those qualities.
- [78] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.
- [79] The Respondent's offending has been aggravated by his claiming that the work was incomplete or that it would be remediated. The issues noted should have either not arisen in the first place or have been dealt with as and when they arose.
- [80] The Respondent has failed to understand that as a Licensed Building Practitioner, he is responsible for his work as well as the work of those under his supervision. He has shown little if any understanding of the licensing regime under which he carried out restricted building work.
- [81] Taking all of the above factors into account, the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct and to protect the public.
- [82] Cancellation will also ensure that the Respondent's competence is re-evaluated under the Licensed Building Practitioners Rules 2007 if and when he seeks to obtain a new licence.
- [83] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of six (6) months.

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 case²⁷.

- [86] In *Collie v Nursing Council of New Zealand*²⁸ 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] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a half-day hearing of a matter of this type. It is less than 50% of actual costs.

Publication

- [88] 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 Act²⁹. 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.

- [89] 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.
- [90] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³¹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³². 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*³³.

²⁷ *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.

²⁸ [2001] NZAR 74

²⁹ Refer sections 298, 299 and 301 of the Act

³⁰ Section 14 of the Act

³¹ Refer sections 200 and 202 of the Criminal Procedure Act

³² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³³ *ibid*

- [91] 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 interest³⁴. 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.
- [92] Based on the above, the Board will order further publication by way of Code Words and the Board's website. The Respondent will be named.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of six [6] months.

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 be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

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

Submissions on Penalty, Costs and Publication

- [95] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **14 August 2020**. 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.
- [96] 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

³⁴ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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

Right of Appeal

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

Signed and dated this 24th day of July 2020



Mel 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.*