

## Before the Building Practitioners Board

	BPB Complaint No. CB25688
Licensed Building Practitioner:	Joseph Taupo (the Respondent)
Licence Number:	BP120568
Licence(s) Held:	Bricklaying and Blocklaying – Structural Masonry, Veneer

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Queenstown
Hearing Type:	In Person
Hearing Date:	8 December 2022
Decision Date:	21 December 2022
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 a disciplinary offence under section 317(1)(b) of the Act.

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**Summary of the Board’s Decision**

[1] The Respondent carried out building work in a negligent manner. He is fined \$2,000 and ordered to pay costs of \$1,875. A record of the disciplinary offending 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.<sup>1</sup> 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.

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<sup>1</sup> 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 Regulations<sup>2</sup> to hold a hearing in relation to building work at [OMITTED]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:
- (a) carried out or supervised building work or building inspection work at [OMITTED], in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, as set out in the report of Mr [OMITTED] dated November 2019 and the Queenstown Lakes District Council Half high veneer/stone inspection record dated 4 February 2019; and/or
  - (b) 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 investigating the above grounds of complaint, the Board would also consider the remedial work the Respondent undertook at the Complainant's request.

### Function of Disciplinary Action

- [5] 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*<sup>3</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>4</sup>.
- [6] 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*,<sup>5</sup> 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.”*
- [7] 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 Complainant's Regulations focuses on serious conduct that

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<sup>2</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>3</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>4</sup> [1992] 1 NZLR 720 at p 724

<sup>5</sup> [2016] HZHC 2276 at para 164

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 persons<sup>6</sup>:

*... 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.*

- [8] 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 Practitioners<sup>7</sup> (the Code) or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.
- [9] 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**

- [10] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [11] 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.

### **Consolidation**

- [12] The Board may, under Regulation 13, consolidate two or more matters into one hearing but only if the matters are, in the opinion of the Board, about substantially the same subject and the complainant and the licensed building practitioner in respect of each matter agrees to the consolidation.
- [13] The Board sought agreement for consolidation of this matter with Board Inquiry CB25877, an inquiry into Mr [OMITTED], a Licensed Building Practitioner, which arose out of this complaint matter. The consent of all those involved was forthcoming. The two matters were consolidated.

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

<sup>7</sup> 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

**Evidence**

[14] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>8</sup>. 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.

[15] 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.

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

Joseph Taupo	Respondent
[OMITTED]	Respondent in CB25877
[OMITTED]	Witness, [OMITTED]
[OMITTED]	Witness, [OMITTED]

Background

[17] Mr [OMITTED] was contracted by [OMITTED] to complete the brickwork on a new residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion.

[18] At about the time Mr [OMITTED] was engaged, the Respondent contacted Mr [OMITTED] to see if he had any work the Respondent could undertake. Mr [OMITTED] subcontracted the work to the Respondent.

[19] The work was carried out on a per square metre rate. Mr [OMITTED] supplied the sand, cement, bricks and brick ties, the latter of which were suitable for a high earthquake zone. Mr [OMITTED] stated that he did not restrict the quantity of materials supplied.

[20] The Respondent instructed Mr [OMITTED], who was employed by Mr Taupo at the time, to carry out the brickwork in conjunction with two of the Respondent’s other employees. The Respondent was not able to recall the details of the two employees who had worked for him for approximately six months to one year. He noted he may have been able to provide employment records. Mr [OMITTED] gave evidence that they were two English labourers named [OMITTED] and [OMITTED].

[21] The Respondent, at the time, was engaged on another site. He stated he had not viewed the plans and specifications for [OMITTED] but viewed it as a typical brickwork job. He could not recall if he attended the site during the build. Mr

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<sup>8</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[OMITTED] gave evidence that the Respondent attended on three occasions, at the beginning, the middle and at the end of the job.

- [22] Mr [OMITTED] worked on-site with the two employees. In a statement provided for the hearing, he stated that the Respondent was supervising. At the hearing, he accepted that he was supervising the work of the other employees. He stated that they worked as a team and generally on the same profiles of the dwelling. Mr [OMITTED] described their skill level as “passable” but noted that he had to pull them up on the quality of their work “from time to time”. Examples he gave were the quality of the cut edge of bricks and bricks dipping below the line.
- [23] Mr [OMITTED] completed the set out using profiles. He stated that he reviewed the consent prior to undertaking the work. Mr [OMITTED] stated he used a 5:1 mortar mix for the brickwork and that he did so on the Respondent’s instructions. The Respondent stated that he always used a 5:1 ratio and that he understood it was standard industry practice in the Queenstown region. The Respondent had not consulted any literature to determine the correct ratio.
- [24] The Respondent called for inspections. Mr [OMITTED] attended them and stated that he checked the work prior to the inspections. He noted the rebates were “a bit in and out” but were within tolerances. He did not note any other significant issues.
- [25] The Respondent referenced that the dwelling passed a Final Inspection and that a Code Compliance Certificate was issued on 29 May 2019.

[OMITTED] Report

- [26] Mr [OMITTED] outlined his expertise in brickwork commencing in 1995 and which included working with manufacturers, developing a two-storey brick system, work as a standards committee member, and writing publications.
- [27] Mr [OMITTED] attended the site on 19 November 2019 and completed a report dated 21 November 2019 on instruction from [OMITTED]. He noted that he tried to keep costs to a minimum in attending the site and developing his report but that issues were obvious on a visual inspection. He produced a report and affirmed the observations and findings of that report at the hearing. The issues he noted were:
1. *Numerous mortar joints on this dwelling were outside the limitations of 7mm – 13mm in thickness. They ranged from approximately 4mm to 18mm.*
  2. *The mortar joints had not been tooled smooth as required but brushed.*
  3. *Door sills did not slope the minimum 15 degrees, as required.*
  4. *Numerous perpend mortar joints had not been totally filled with mortar, also as required.*
  5. *There was loss of mortar bond between bricks and mortar, evident in most panels.*

6. *There were loose bricks, particularly in the top rows, and adjacent to window and door joinery.*
7. *The quality of the mortar was poor, and in my professional opinion, was well below a bond strength of 200kPa and a compressive mortar strength of 12.5MPa.*

[28] Mr [OMITTED] recommendation was that the brickwork be removed and replaced which was what was ultimately done by [OMITTED] to remediate the issues. [OMITTED] noted that he does not make such a recommendation lightly and had only done so on about 5 or 6 occasions in the past 30 years. His report noted:

*It would be impossible to repair this veneer. There are just too many defects, and of course the over-riding problem is the mortar quality.*

[29] [OMITTED] noted that brickwork should be carried out in accordance with NZS 4210:2001. That standard was referenced in multiple places in the building consent. He expressed his concern that the mortar ratio was 5:1, which he stated would not have had sufficient bond or compressive strength, particularly in an earthquake zone and given the environmental conditions. Mr [OMITTED] report noted that 4210 calls for a minimum bond strength of 200kPa and a minimum compressive strength of 12.5MPa. His opinion was that a 4:1 ratio should have been used and that the only reason to use a 5:1 ratio would have been to save costs.

[30] Further, with respect to the quality of the mortar, Mr [OMITTED] report stated:

*The most serious issue with this brick veneer, is the quality of the mortar. Everything on this veneer could have been installed perfectly, however, if the mortar quality is poor, the veneer becomes totally unacceptable. Having mortar with good bond strength is critical to the long-term performance and security of this brick veneer. One needs confidence that the brick ties anchored into the mortar, will perform and secure this heavy-weight cladding, in a major seismic event, certainly over the next 50 years.*

And

*This mortar lacked both bond-strength and compressive strength based on the following:*

1. *There was evidence of poorly mixed mortar observed where sand was in its raw state.*
2. *Using just one hand and an 8mm flat nose screwdriver, I could scrape and easily remove the mortar from perpend joints, in a matter of seconds! If I had used my body weight with two hands on the screwdriver, it would not have been difficult to remove all the mortar; I chose not to do this. That should just be impossible. Minimal force was used.*
3. *There were numerous evidences of loss of bond, between brick and mortar, plus loose bricks. Minor earthquakes could easily cause this*

*damage with very weak mortar, but just as likely, in fact more likely, to be the result of lack of bond strength in the mortar.*

[31] Mr [OMITTED] went on to note that high temperatures when laying the bricks would have impacted the mortar and that his research had indicated the bricks were laid at a time of high heat. He stated:

4. *... To ensure that the freshly laid mortar, cured correctly, and the 'hydration' process was successfully completed, the bricklayer would have needed to keep this veneer covered, and in a continual wet state for at least 48 hours ...*

[32] Mr [OMITTED] gave evidence that the mortar was mixed on-site by a labourer and that the Cromwell sand that was used had to be dry mixed prior to water being added. He noted that if a mix was poor, it would be returned and that, at times, lumps of sand had to be pried out as laying progressed. Mr [OMITTED] stated that they tried to work in the shade and that the mortar mix was made a bit wetter, and the bricks were dunked in water prior to being laid so as to compensate for the heat. Once laid, the bricks were not dampened or kept in the shade as they dried.

[33] Mr [OMITTED] also considered the perpend joint issue to be serious. He noted:

*I view the discovery of perpend joints that have not been completely filled as serious, and certainly would impact on the seismic performance of this veneer even if the mortar quality was acceptable. It is also what we cannot see that must be of concern.*

[34] At the hearing, Mr [OMITTED] stated that some tooling in of mortar in perpend would be okay but that the failings were too major and that it was a structural issue. Again, he noted that poor mortar, heat and lack of hydration when the mortar was curing could have contributed to the issue.

[35] The Respondent noted that door slamming can cause bricks to loosen. In his response to the complaint, he stated he went to the site two or three times to remedy the work, which included replacing chipped bricks and relaying loose bricks. At the hearing, he stated that he replaced some 20 bricks after the Code Compliance Certificate had been issued. The Respondent's evidence at the hearing was that he did not think the brickwork that he observed was substandard and noted that the work was passed by the Council and that a Code Compliance Certificate was issued.

[36] In the complaint, the Complainant stated:

*Joseph did come back to fix some of these issues but ultimately didn't attempt a permanent fix at any stage and if anything the repair jobs were worse than the original work.*

[37] Mr [OMITTED] described the job as "not his proudest" and "not to his own standards".

### Remediation

- [38] [OMITTED] gave evidence that the bricks were taken down and Signature Homes paid for replacement bricks after the Code Compliance Certificate had been issued. The work was not consented. Mr [OMITTED] paid for the labour with Mr [OMITTED] providing assistance to deconstruct the cladding. Mr [OMITTED] had intended to assist with the reconstruction but was prevented from doing so by an injury. The labour costs have been on charged to the Respondent.
- [39] The replacement bricks were laid using a 4:1 sand-to-cement ratio. No issues with brick ties or cavity were noted during deconstruction but there were some loose bricks toward the top courses of bricks with the bottom courses being more resistant to deconstruction.

### Record of Work

- [40] The Respondent stated, at the hearing, that he thought he had provided a record of work to [OMITTED] by email but not to the Territorial Authority. He was asked to provide a copy together with a copy of the email correspondence. Following the completion of the hearing, he provided a copy of the inspection report but not of the record of work or email to [OMITTED].
- [41] [OMITTED] stated that he had not provided a record of work as he considered that it was the Respondent's responsibility to provide one.
- [42] The Board obtained a copy of the Territorial Authority file. It did not contain records of work from the Respondent or Mr [OMITTED].

### Post Hearing Submissions

- [43] After the hearing, the Board received a written closing statement from a representative of the Respondent. The submission noted the successful completion of "over 100" other jobs and that the work had passed inspections. He laid responsibility for any failings with Mr [OMITTED]:

*It was clear from evidence presented at the hearing Joe Taupo never laid a brick and was let down by poor workmanship of [OMITTED] [LPB [OMITTED]] something he acknowledged at the hearing. [OMITTED] oversaw the job and supervision of labourers, [OMITTED] and [OMITTED].*

- [44] Counsel for Mr [OMITTED] provided a written submission. He noted:

- [8] *Mr [OMITTED] culpability for any negligent or incompetent building work is significantly mitigated for the following reasons:*
- (a) There were multiple other tradesmen working on site;*
  - (b) Mr [OMITTED] took several proactive steps to improve the quality of the restricted building work;*
  - (c) Mr Taupo's directions to his employees significantly exacerbated issues;*

- (d) *The remedial work undertaken by Mr Taupo appears to have created further issues; and*
- (e) *Mr [OMITTED] attempted to remedy issues upon learning the owner of the property was concerned about the work.*

[45] With regard to a record of work, the submissions noted:

[18] *It was Mr [OMITTED] understanding that upon completion of work at the Property, Mr Taupo was the only individual required to provide a RoW to QLDC.*

[19] *Mr Taupo called for code compliance inspection and half-high and final residential inspections were passed; unfortunately, Mr [OMITTED] was of the mistaken belief a RoW had been provided and this was sufficient to discharge all obligations.*

[46] Counsel summarised [OMITTED] position as follows:

**Summary**

[20] *Mr [OMITTED] has provided a consistent and reliable narrative from the outset of proceedings. He has accepted responsibility where appropriate and should be given credit for as much.*

[21] *Given Mr [OMITTED] relative inexperience as a licenced building practitioner during his time working on the property, alongside various mitigating factors, counsel invites the Board to adopt an educational and lenient approach, should it consider a penalty necessary.*

**Board's Conclusion and Reasoning**

[47] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and **should** be disciplined.

[48] The Board has decided that the Respondent **has not** 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).

Negligence

[49] 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*<sup>9</sup> test of negligence which has been adopted by the New Zealand Courts<sup>10</sup>.

[50] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>11</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[51] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>12</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>13</sup>.

[52] 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.*

[53] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>14</sup> and be carried out in accordance with a building

<sup>9</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

<sup>12</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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

<sup>14</sup> Section 17 of the Building Act 2004

consent<sup>15</sup>. 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.

- [54] Turning to seriousness in *Collie v Nursing Council of New Zealand*,<sup>16</sup> 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.*

- [55] The Respondent's role was, in terms of carrying out work, minimal. He returned to site a number of times, checked the work that was being complained about, and removed and installed approximately 20 bricks prior to a Code Compliance Certificate being issued. The brick masonry veneer forms part of the wall cladding for a dwelling, and, as such, it is restricted building work as it is building work relating to the external moisture management system of a residential building.

- [56] His involvement in the building work, however, went further. He gave directions on how the brickwork was to be carried out in that he instructed that a 5:1 mortar mix was to be used without having reviewed the building consent documentation. The instructions were issued to Mr [OMITTED], a Licensed Building Practitioner with a Brick and Blocklaying Licence who ought to have known better. He also reviewed the work that had been completed and considered it was up to standard.

- [57] In C2-01247,<sup>17</sup> the Board considered whether a Licensed Building Practitioner who gave directions to another Licensed Building Practitioner could be considered to be "carrying out" building work. The matter related to a direction to site a dwelling in an incorrect position. In the decision, the Board noted:

*[38] The Building Act clearly envisages that more than one licensed building practitioner can be involved in a building project and that each practitioner is liable for their actions and conduct. The Act also clearly envisages that the actions and conduct of a practitioner can extend beyond physical building work and can include preparatory or auxiliary work.*

*[39] Building work is defined in section 7 of the Act as follows:*

*building work —*

*(a) means work—*

*(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and*

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<sup>15</sup> Section 40(1) of the Building Act 2004

<sup>16</sup> [2001] NZAR 74

<sup>17</sup> C2-01247, Neal Kaler, a hearing held on 24 February 2016

(ii) *on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

(b) *includes sitework; and ...*

[40] *The phrase “for, or in connection with” used in the definition connotes, in the Board’s view, a wide range of actions and conduct including those of the Respondent. The Board considers this interpretation is consistent with the requirement to interpret terms in the Act from the text so as to give effect to the purpose of Parliament<sup>18</sup>. The Board may (if necessary), in ascertaining the meaning, consider other indications provided in the Act. In this respect the provisions in s 3 “Purposes of the Act”<sup>19</sup>, s 14E “Responsibilities of the Builder”<sup>20</sup> and s 282A “Purposes of Licensing Building Practitioners”<sup>21</sup> have been taken into consideration.*

[41] *In this instance the Respondent took part in locating boundary pegs and more importantly undertook, when a boundary discrepancy was identified, to check siting issues. The Board considers such actions fall within the definition of building work and would expect a reasonable licensed building practitioner in such circumstances to take actual*

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<sup>18</sup> Refer section 5 of the Interpretation Act 1999

<sup>19</sup> Section 3 Purpose

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.

<sup>20</sup> Section 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.

<sup>21</sup> S 282A Purposes of licensing building practitioners

The purposes of licensing building practitioners under this Act are—

- (a) to assess and record building practitioners as having certain skills and knowledge relevant to building work; and
- (b) to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.

*steps such as checking the title or instructing a surveyor both of which could have been done. The Respondent, however, took no such steps and in doing so he fell below the standards expected of a licensed building practitioner and has been negligent.*

- [58] There are, on the basis of the above, two questions for consideration. The first is whether the Respondent carried out building work in a negligent manner when he attended to remedial work and the review of the work that he undertook. The second is a more general question. Did the instructions the Respondent issued amount to carrying out building work, as per the above, and, if so, were those instructions carried out in a negligent manner?
- [59] In considering the above matters, the Board does have to take into consideration that Mr [OMITTED] was the person who carried out and supervised the original brickwork, which resulted in the issues. The Board needs to consider whether that is a matter that absolves the Respondent from responsibility or whether it is a mitigating factor should the Board find that the Respondent was negligent.
- [60] Looking at the Respondent's review of the brickwork and the remedial work he carried out, the Board noted that the Complainant considered the remedial work was worse than the original work and that whilst the Respondent considered the overall brickwork to have been completed to an acceptable standard an expert expressed his opinion that it had to be removed and replaced because of a lack of bond and compressive strength. The expert also noted that issues were obvious on a visual inspection. Moreover, the Respondent attended the site on two occasions during the build and was informed of issues by Mr [OMITTED]. Notwithstanding, he did not identify and deal with quality and compliance issues.
- [61] The Board considers that a competent Licensed Building Practitioner should have identified the quality and compliance issues that were evident. Further, given the Respondent's engagement by Mr [OMITTED] and his overall role as the contractor, he should have taken action to deal with those issues. Simply relying on a passed inspection when there are obvious quality and compliance issues is not acceptable. The reality is that Building Consent Authorities can and do make mistakes. Further, issues that may not have been apparent at the time of a Code Compliance Certificate being issued can arise over time and cannot be ignored if they do. The only action that the Respondent did take was to remove and replace some loose bricks. In doing so, he did not rectify the issues.
- [62] The Board finds that the Respondent's conduct, in assessing the work and failing to identify and appropriately deal with quality and compliance issues that should have been apparent to a competent Licensed Building Practitioner with a Brick and Blocklaying Licence, fell below what is considered to be an acceptable standard.
- [63] Turning to the instructions issued, the Respondent directed that a 5:1 mortar mix be used. He stated it was local industry practice. He did not consult any industry standards of the building consent issued, and the mix was not what was specified in the consent. Mr [OMITTED] stated that it was not industry practice to use 5:1. Mr

[OMITTED] stated that a 4:1 mix should have been used. Mr [OMITTED] should also have known better and should not have followed the instruction. The question remains, however, whether the Respondent was negligent for issuing such and instruction. The Board finds that he was, and, in doing so, it relies on the same reasoning as in C2-01247 above.

[64] Finally, the Board must consider how serious the conduct was – was it more than mere error, oversight or inadvertence? Again, the Board returns to the point made above about the quality and compliance issues. They were obvious and should not have been ignored. As such, the Board has decided that the Respondent was negligent in issuing the instruction that he did.

[65] 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.

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 work<sup>22</sup>.
- [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] There are two matters for consideration. The first is whether the Respondent was required to provide a record of work for the original work, and the second is whether one was required for the remedial work that he carried out.
- [69] Looking firstly at the original work, whilst the Board has found that the Respondent carried out building work in a negligent manner, records of work relate to restricted building work, which has a much narrower definition. On the basis of that definition, the restricted building work was carried out by Mr [OMITTED]. As such, the Respondent did not have to provide a record of work for it.
- [70] Turning to the remedial work, under section 401B of the Act, restricted building work is that which is carried out under a building consent.<sup>23</sup> The only building work that the Respondent undertook that could be considered restricted building work was in relation to remedial work after a Code Compliance Certificate had been issued. As a Code Compliance Certificate had issued, the building consent had come to an end. That being the case, the Respondent’s work was not restricted building work, and he did not have to issue a record of work for it.
- [71] The Board does, however, recommend that the Respondent update his knowledge and understanding of the record of work framework. His position at and prior to the hearing was that he was the Licensed Building Practitioner that was required to provide the record of work for the consented work. That was not the case. He should obtain and study the Ministry of Business Innovation and Employment Regulatory Handbook to assist him in his understanding of the regulatory environment within which he operates.

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<sup>22</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>23</sup> *401B Order in Council declaring work to be restricted building work*

- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*
- (2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*
- (3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*
- (4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

### Penalty, Costs and Publication

- [72] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the
- [73] 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

- [74] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>24</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [75] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>25</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [76] The Board adopted a starting point of a fine of \$2,000, an amount which is consistent with other fines imposed by the Board for similar levels of offending. There are aggravating and mitigating factors.
- [77] The Board found the Respondent’s failure to take responsibility for the brickwork as it progressed and accountability for it once issues were identified and complained about to be an aggravating factor. Countering that, Mr [OMITTED] was the person who carried out and supervised the original brickwork in a negligent manner. That is a mitigating factor. Taking the countervailing factors into account, the Board has decided that it will not adjust the fine from the starting point. It is set at \$2,000.
- [78] In reaching the above penalty decision, the Board has also taken into consideration the conduct of Mr [OMITTED] and the comparative culpability of each to ensure consistency in the penalties imposed.

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<sup>24</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>25</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

## Costs

- [79] Under section 318(4) of the Act, the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [80] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>26</sup>.
- [81] In *Collie v Nursing Council of New Zealand*,<sup>27</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [82] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>28</sup> the High Court noted:
- [46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
- [47] *Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*
- [83] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex. Adjustments based on the High Court decisions above are then made.
- [84] The matter was set down as a half-day consolidated hearing. The Board’s scale costs for a half-day hearing is \$3,750. The Board sees no reason to depart from this amount. However, given that the matter was consolidated, it is appropriate that the costs be split between the two respondents. As such, the costs order is set at \$1,875.

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<sup>26</sup> *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.

<sup>27</sup> [2001] NZAR 74

<sup>28</sup> CIV-2011-485-000227 8 August 2011

### Publication

[85] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>29</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

*In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

[86] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[87] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>30</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>31</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>32</sup>. 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*<sup>33</sup>.

[88] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>34</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

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<sup>29</sup> Refer sections 298, 299 and 301 of the Act

<sup>30</sup> Section 14 of the Act

<sup>31</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>32</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>33</sup> *ibid*

<sup>34</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

### Section 318 Order

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

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

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,875 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

**In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**

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

### Submissions on Penalty, Costs and Publication

[92] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **10 February 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.

[93] 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

[94] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>ii</sup>.

Signed and dated this 17 day of January 2023.



**M Orange**  
Presiding Member

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### <sup>i</sup> **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."*

### <sup>ii</sup> **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.*