

Before the Building Practitioners Board

	BPB Complaint No. CB25428
Licensed Building Practitioner:	Halimalu Taulupe (the Respondent)
Licence Number:	BP128055
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	7 July 2021
Decision Date:	19 July 2021

Board Members Present:

Mr M Orange, Deputy Chair, Barrister Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member

Procedure:

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

Disciplinary Finding:

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

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Summary of the Board’s Decision

[1] The Respondent carried out building work in a negligent manner (section 317(1)(b) of the Act) and in a manner that was not in accordance with a building consent (section 317(1)(d) of the Act). The Respondent failed to provide a record of work on completion of restricted building work (section 317(1)(da)(ii) of the Act). The Respondent is censured for the findings under sections 317(1)(b) and (d) of the Act and ordered to pay a fine of \$1,500 for the finding under section 317(1)(da)(ii) of the Act. He is ordered to pay costs of \$2,000.

The Charges

[2] 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:

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

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, the building work noted in the complaint form (page 27 of the Board's documents, document number 2.1.13) may not have met the standards expected of a licensed building practitioner;
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT, elements of the work noted in the complaint form (page 27 of the Board's documents, document number 2.1.13) may not have as per the building consent; and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

Function of Disciplinary Action

- [3] 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.
- [4] 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."*
- [5] 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

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

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.

- [6] 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.
- [7] 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

- [8] 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.
- [9] 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.

Background to the Complaint

- [10] The complaint was made by [Omitted], a Licensed Building Practitioner with a Design Area of Practice 3 Licence (the Complainant). He was the owner of the property on which the building work in relation to an alteration and addition to a residential dwelling that was carried out and the designer who developed and submitted the building consent documentation. As a result of the complaint made, the Board also decided to initiate a Board Inquiry into the conduct of the Complainant (Board Inquiry number CB25637). A separate hearing was held with respect to the Complainant and prior to this hearing taking place.

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

Consolidation

- [11] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [12] The Board sought agreement for consolidation of this matter with complaint number CB25637. The Complainant did not consent. The two matters were not consolidated.

Evidence

- [13] 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 that allow it to receive evidence that may not be admissible in a court of law.
- [14] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [15] In addition to the documentary evidence before the Board, it heard evidence at the hearing from the Complainant and the Respondent. The Board also clarified that it had, on the previous day (6 July 2021), held a hearing with regard to a Board Inquiry into the conduct of the Complainant and that it had received evidence that may be relevant to the allegations made about the Respondent. The Board advised that it may, in accordance with its evidentiary discretion, take evidence heard in matter CB25637 into account in the matter, provided the evidence had sufficient probative value which was not outweighed by any prejudicial effect on the Respondent.
- [16] The Complainant provided an opening statement in which he noted that the building work the Respondent was engaged to carry out was simple construction and that, as a result of the Respondent's poor workmanship, he dismissed the Respondent when the building work relating to the first construction first stage was closed in and prior to any internal linings being installed.
- [17] The Respondent's opening submission was that the work was not complete and that he left the job after a weather event. He stated that he had done work for the Respondent over the past 13 years on various projects of differing scales. Much of the work was simple maintenance work on the Complainant's rental property, but that there had also been a number of major projects.
- [18] The Respondent outlined his staffing arrangements. He has four staff members, one of whom Polonga Tau'alupe-Pedro is licensed, one is an apprentice who had approximately one to one and a half years' experience (at the time the work was

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

carried out) and two labourers who had worked with the Respondent for approximately one year. The Register of Licensed Building Practitioners shows that Polonga Tau'alupe-Pedro was licensed on 18 August 2016 and that he holds a Carpentry Licence.

- [19] The Respondent stated he was on-site approximately 50% of the time and that he carried out and supervised some but not all of the building work. His evidence was that Polonga Tau'alupe-Pedro also carried out or supervised some of the building work. The building work the Respondent stated he carried out or supervised was the demolition work, the framing of a conservatory, foundations and framing of a rumpus room and the raising of a deck joist over it to suit a lintel position, and exterior cladding and the installation of ply on a roof ready for a membrane to be installed. The Respondent temporarily installed external joinery. The Respondent stated Polonga Tau'alupe-Pedro installed the trusses. The Respondent was involved in some remediation work on the trusses.
- [20] The Complainant was on site most days, mainly in the morning. Discussions were held between the Complainant, who was the project manager, and the Respondent as regards the work to be completed. The Complainant and the Respondent described the on-site decision-making process as collaborative. The Respondent arranged inspections. The Complainant attended most of them. The Respondent ordered materials, except for the windows and the steel posts which the Complainant ordered. The Complainant organised other trades as required. There was a full set of consented documents on-site.
- [21] The Respondent stated, in a written response to the Complaint, that "*there was poor project planning and poor management of the overall project*" and that "*the designer's reproduction of the plan was poor and only preliminary for a significant part of the project*".
- [22] The Complainant included a list of 30 issues with the complaint. Those issues formed the basis of the allegations that the Board decided it would further investigate. Some of those issues were commercial or contractual in nature and, as such, were not further investigated. The following allegations were further investigated at the hearing:
- Issue No. 2: Conservatory framing top plate incorrect as FFL inside not allowed for. Which also affected the window/door sills/lintel heights which all required correcting.*
- [23] The Respondent accepted that he had made a mistake in that he missed the 90mm difference in finished floor level, which could be observed on site. He stated that he rectified the issue once it was brought to his attention by the complainant by installing an extra top plate.

Issue No. 3: Door D9 not in correct place. Needed repositioning.

[24] The Complainant stated the door W9 (not D9) was 100mm out. The Respondent noted that there were no measurements on the plans to work off and that he based the set-up on the requirements for a 760mm door.

Issue No. 4: Plywood bracing to western wall conservatory installed without competing strapping first. This was done even though Michael had informed Anthony not to install the ply until the strapping was completed. Plywood removed and new ply installed.

[25] The Respondent accepted the allegation.

Issue No. 5: Western conservatory corners not built as per plans. Required rebuilding. There were not hold downs in the corners, need to be added.

[26] The Complainant stated the timber sizes were not correct, and the work had been carried out in accordance with the usual industry practice as opposed to the building consent that had been issued. In essence, the plans had not been followed.

Issue No. 6: W2 bi-fold doors sill needed to be corrected.

[27] The Complainant could not recall the issue.

Issue No. 9: Conservatory roof trusses not installed as per Carters drawings. Truss adjacent to new top floor wall in wrong position. Due to the incorrect position of the two final (eastern side) trusses or existing roof as removed than needed, exposing the house to the elements.

[28] The Complainant stated that the set out was incorrect with the first truss being approximately 500mm too far from the existing building. That resulted in a dummy rafter being installed at the parapet instead of the final truss as shown on the building consent. The Respondent stated that the work was carried out by his cousin, Polonga Tau'alupe-Pedro. The Respondent was involved in remedial work to address the issue.

Issue No. 10: Malu informed the client weatherboard thickness is 35mm. This is incorrect being 40mm. This made all window/door reveals too short. All window and door joinery needs to be corrected with new revels.

Issue No. 11: The client asked Malu to measure all made up window/door joinery at the factory so framing will work together.

[29] The weatherboards were to match existing. The Respondent stated he assumed the thickness of the existing weatherboards. He thought they would be the standard size. They were not. He did not open up the wall to confirm what the sizes were before providing detail to the Complainant. The Complainant ordered the windows based on the information provided by the Respondent.

Issue No. 12: There was no flashing in the corner left hand side front door. This needed to be added. Also how the detail is built needs to be amended. Junction where weatherboards meet in corner needs correcting.

[30] The area complained about was a junction between the new work and the existing building. The Respondent noted that there was no detail on the consented plans as to how the work was to be completed. He further noted that there was insufficient space at the junction for a flashing to be installed, that the work was incomplete and that he would have eased the cladding out to allow a flashing to be installed. The Complainant stated that a flexible flashing was installed by a subsequent builder.

Issue No. 13: D9 weatherboards too short, not behind joinery. Sill flashing too long.

[31] The Complainant provided photographs of the issue and noted that the gap was too great for a scribe to cover. The Respondent stated that Polonga Tau'alupe-Pedro did the work, which had been set up to suit a cavity system cladding, and that he instructed that the weatherboards were to be removed and replaced.

Issue No. 15: Eastern side deck fall needs to be corrected. Remove top plate and carry line to match lintel (-45mm).

[32] The Respondent constructed the foundation and footing to match existing and moved existing framing underneath the deck out to the new building line. He installed a lintel that hit the deck. He raised the issue with the Complainant, who told him to just raise the deck. The Complainant could not recall if he issued that instruction.

Issue No. 16: One true bolt burst green concrete in slab under deck.

[33] The Respondent agreed with the issue noting that the concrete may have been too green.

Issue NO. 19: Hardiflex with jointers delivered to site where we have plastered joints so product order is wrong. One sheet with joiners could be used on conservatory parapet only. Basement cladding Hardiflex to match existing plastered joints.

[34] The Respondent had ordered the Hardiflex sheets but could not recall if he had ordered the joiners but noted that the direct fixed Hardiflex sheets had not yet been fixed.

Issue No. 20: 2 off 280x45 timber delivered to site where as 240x90 LVL is required for lintel over kitchen.

[35] The Complainant stated that engineering calculations required an LVL, and he issued a site instruction for an LVL to be installed to provide for an increased opening size. A minor variation was not filed for the change in opening size. The Respondent could not recall what was ordered.

Issue No. 18: Roof protection taken off when rain was forecast. And not made watertight after work taking place. Leading to leaking in our house family room. There was a week or

more of fine weather prior to the wet day 3 July 2019 without work progressing on site. Watergate Plus installed by Michael has been damaged so it is not keeping the ply dry. Ply needs to be 18% moisture level or less otherwise the membrane can't be laid.

Issue No. 22: Michael has asked Malu (about three times) to build a temporary gable roof over existing house to protect from weather. This will remove the valley from the roof and make temporary waterproofing much easier.

[36] Shrinkwrap was used for the first stage, but temporary waterproofing using a tarpaulin supplied by the Complainant with polythene underneath was installed for the second stage of the work. The Respondent stated time factors, communications issues, and pressures on another job meant shrinkwrap was not installed. The temporary cover was adequate for one weather event but failed when a second event occurred. During the second event, water pooled underneath the tarpaulin on the polythene. The Respondent stated the temporary gable option had been discussed but that he was dismissed from the job before it could be installed.

Issue No. 23: The ventilation slot on the underside of the conservatory roof was not installed. Drawing not followed. To get sign off from the roofing installed this needs to be done.

[37] The Respondent accepted that the building work had not been carried out correctly. The Complainant noted that it was a difficult issue to remediate.

Issue No.26: Mitred bevel back weatherboard joints open.

[38] The Respondent stated that Polonga Tau'alupe-Pedro carried out the building work.

Issue No. 29: Front door sill flashing not lining up, short one side and protruding at the other end.

[39] The Respondent accepted that the work was not correct.

[40] The Respondent was also questioned about the construction methodology for a new foundation and footing under a deck. He stated he built it to match existing and that he could not recall where the foundation details came from, but it may have been from discussions with the Complainant. The Complainant noted that the foundations were inspected by the engineer and that NZS 3604 construction methodology would have been used. The consented plans did not contain any foundation details for this aspect of the build.

[41] With regard to the record of work, the Respondent stated that he provides a record of work when asked for one at the end of a job at the final inspection. He stated he does a record of work for all of the restricted building work, including that which is carried out or supervised by other Licensed Building Practitioners. The Respondent's building work started in August 2018 and came to an end on or about August 2019 when his contract for services was cancelled. A record of work dated has not been provided.

[42] The Respondent apologised for the mistakes that had been made and stated he had learnt from the matter. He stated that he would, in the future, make sure that he followed the correct process, the consented plans and the building code.

Board's Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) in respect of issues 2, 4, 5, 8 and 23 and 30;
- (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) in respect of issues 5, 8, 23 and 30; and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)

and **should** be disciplined.

[44] The Board made its findings that the Respondent had breached section 317(1)(b) or 317(1)(d) of the Act on the basis that the Respondent accepted responsibility and acknowledged his failings.

[45] The Board noted, with respect to issues 9, 13 and 26, that the building work in question was not completed to an acceptable standard but that another Licensed Building Practitioner had carried out the building work. Under the licensing regime in the Act, each Licensed Building Practitioner is responsible and accountable for their own work. As such, the Board found that the Respondent was not responsible for the issues.

[46] With regard to the remaining issues, the Board that they were either not proven or that the conduct was not sufficiently serious enough to warrant a disciplinary finding. This finding was made on the basis of the Court's directions on professional disciplinary matters. For example, in *Collie v Nursing Council of New Zealand*,⁷ 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.

⁷ [2001] NZAR 74

Negligence

- [47] Turning to the finding of negligence, it 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.
- [48] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [49] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².
- [50] 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:*

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

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

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

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

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

- (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.*

- [51] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.
- [52] With regard to issues 2, 4, 5, 8 and 23 and 30, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had 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. Issues 2, 4, 5 and 8 were all structural issues. The manner in which the work was carried out would not have met the requirements of clause B1 of the Building Code. The manner in which the building work relating to issues 23 and 30 were completed may have compromised the weathertightness and durability of the building work (clauses E2 and B2 of the Building Code).

Contrary to a Building Consent

- [53] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued. Section 40 provides:

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

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

- [54] 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.
- [55] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that needs to be proven is that the building consent has not been complied with.

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

No fault or negligence has to be established¹⁵. The building work in relation to Issues 5, 8, 23 and 30 had not been completed in accordance with the building consent. As such, the disciplinary offence has been committed. The Board does, however, not the commonality of the offending with the findings in respect of negligence and it will, when considering penalty, treat the offending as a single incidence.

Record of Work

- [56] 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 work¹⁶.
- [57] 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.
- [58] The Board discussed issues with regard to records of work in its decision C2-01170¹⁷ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [59] 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.
- [60] 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*¹⁸ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [61] As to when completion will have occurred is a question of fact in each case. 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.
- [62] In the present matter, the Respondent’s involvement in the building work came to a premature end as a result of the contract for services being cancelled. Given this, completion occurred in August 2019, the cancellation date as, at that date, the

¹⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁸ [2018] NZHC 1662 at para 50

Respondent would not have been able to carry out any further restricted building work.

- [63] A record of work has not been provided. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [64] 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.
- [65] 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.
- [66] The Respondent should also note that he cannot provide a record of work for restricted building work that has been carried out or supervised by other Licensed Building Preconditioners. Each and every licensed building practitioner who carries out restricted building work must provide their own record of work. This accords with the statutory intent of the record of work provisions which is to create a record of all of the Licensed Building Practitioners that carried out or supervised restricted budling work and what it is that they did or supervised.

Penalty, Costs and Publication

- [67] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [68] 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

- [69] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁹ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times,

¹⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.

- [70] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁰ 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.
- [71] Ordinarily, findings under sections 317(1)(b) and (d) of the Act of this nature, which were at the mid to lower level of offending, would result in a moderate fine. The Board considered, however, that the Complainant's own conduct, as regards the quality of the design and his involvement in project management, contributed to the on-site issues. The Board has taken this, and the Respondent's expressed remorse and statement that he has learnt from the matter into account as mitigating factors. On the basis of those factors, the board has decided, as regards section 317(1)(b) and (d) that a censure will suffice. A censure is a public expression of disapproval.
- [72] With regard to the finding under section 317(1)(da)(ii) of the Act, record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There are no aggravating nor mitigating factors present as regards the record of work. As such, the Board sees no reason to depart from the starting point. The fine, for that disciplinary finding, is set at \$1,500.

Costs

- [73] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [74] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²¹.
- [75] In *Collie v Nursing Council of New Zealand*,²² where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

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

²¹ *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.

²² [2001] NZAR 74

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

- [76] The Board's scale costs for a half-day hearing is \$3,500. The scale costs for a consolidated hearing is where two matters are dealt with in one hearing is \$2,000 per respondent. Given the matter was to be consolidated but the Complainant would not agree, the Board has decided to impose costs against the Respondent of \$2,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [77] 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 Act²³. 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.

- [78] 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.
- [79] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. 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*²⁷.
- [80] 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 interest²⁸. 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.
- [81] Based on the above, the Board will not order further publication.

²³ Refer sections 298, 299 and 301 of the Act

²⁴ Section 14 of the Act

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured in respect of his conduct under sections 317(1)(b) and 317(1)(d) of the Act and, in respect of the finding under section 317(1)(da)(ii) of the Act the Respondent is pursuant to section 318(1)(f) of the Act ordered to pay a fine of \$1,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

[83] 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

[84] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **16 September 2021**. 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.

[85] 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

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

Signed and dated this 26th day of August 2021



Mr M Orange
Presiding Member

ⁱ **Section 318 of the Act**

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