

## Before the Building Practitioners Board

|                                 |                           |
|---------------------------------|---------------------------|
|                                 | BPB Complaint No. CB25675 |
| Licensed Building Practitioner: | Feng Wu (the Respondent)  |
| Licence Number:                 | BP 129165                 |
| Licence(s) Held:                | Carpentry and Site AoP 2  |

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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           | Auckland      |
| Hearing Type:              | In Person     |
| Hearing and Decision Date: | 22 March 2022 |

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr C Preston, Chair  
Mrs F Pearson-Green, LBP, Design AOP 2  
Ms J Clark, Barrister and Solicitor, Legal Member  
Mr G Anderson, LBP, Carpentry and Site AoP 2

#### Appearances:

Ms A Eager and Mr A Nisbet for the Respondent

#### 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 and in a manner that was not in accordance with the building consent issued. He also failed to provide a record of work on completion of restricted building work. He is fined \$2,500 and ordered to pay costs of \$3,500. The disciplinary finding will be recorded on the public Register for a period of three years.

### The Charges

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</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:

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<sup>1</sup> 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 Respondent, under his Carpentry Licence, may have carried out and/or supervised building work that failed a number of Auckland Council inspections, outlined in Tab 4.3 (pages 260-409) of the documents, and the Respondent, under his Site AoP 2 Licence may have failed to project manage the building works, construction sequencing, sub-contractors, inspections and failed inspections, to an acceptable standard;
- (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, the building work identified in the failed Auckland Council inspection reports outlined in Tab 4.3 (pages 260-409) of the documents may not have been carried out in a manner that was consistent with the building consent issued; 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [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*,<sup>4</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."*

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

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

- [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 conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons<sup>5</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.*

- [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 are important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [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.

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</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.
- [11] 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

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

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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.

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

|           |  |
|-----------|--|
| Feng Wu   | Respondent   |
| [Omitted] | Complainants   |
| [Omitted] | Licensed Building Practitioner, Carpentry, BPO124265, cladding installer                                     |
| [Omitted] | Licensed Building Practitioner, Design AoP 2, designer for the building consent and engineer to the contract |
| [Omitted] | Membrane installer   |
| [Omitted] | Licensed Building Practitioner, Carpentry, BP110690, foundation installer                                    |

- [13] The documents before the Board included statements created for the purpose of an adjudication under the Construction Contracts Act 2002 (the CCA). Section 68 of the CCA provides that evidence and documents in relation to an adjudication are confidential but that the parties to it can agree to confidentiality being waived. At the commencement of the hearing, both the Respondent and the Complainant, who were parties to the adjudication, consented to the admission of the statements.
- [14] Counsel for the Respondent assisted the Board by providing comprehensive submissions. Those submissions included an acknowledgement from the Respondent that he had breached sections 317(1)(d) and 317(1)(da)(ii) of the Act but that the Board should not make a finding of negligence or incompetence under section 317(1)(b) of the Act on the basis that the conduct was not serious enough to warrant a disciplinary outcome. The hearing and the Board's investigations focused on the Respondent's conduct as it related to the charge under section 317(1)(b) of the Act.

#### Background to the Build

- [15] The Respondent's company, JR Group NZ Limited, was contracted to build a new residential home for the Complainants. It was a substantial home (432m<sup>2</sup>) and a complex build over three levels with architectural features. [Omitted] was the designer for the project. [Omitted] prepared and submitted the building consent documentation and had been engaged by the Complainants to approve progress claims as the build progressed. [Omitted] was described as the engineer to the contract.
- [16] The Respondent both carried out and supervised building work (carpentry work on foundations, framing and trusses) on the project. He supplied materials, labour and

engaged subcontractors, some of whom were Licensed Building Practitioners. The main subcontractor builders that he engaged were [Omitted] (BP[Omitted], Licensed Building Practitioner, Carpentry) and [Omitted]. The Board resolved to summon [Omitted] to the hearing but was advised that [Omitted], whose licence has been voluntarily suspended, had left New Zealand prior to the hearing proceeding. He did not appear. [Omitted] was responsible for the installation of the building wrap, cladding cavity battens and windows and had had extensive previous experience with the Respondent. [Omitted] carried out the installation of Nu Wall cladding.

- [17] The build did not progress to its completion. Nor was it without issues. Counsel for the Respondent's submissions noted:

*The project did not run smoothly and throughout the construction process amendments were required to the consent design. Numerous changes to the design requested by the Owners and additional works required by Auckland Council also led to delays.*

- [18] A commercial dispute arose toward the end of the build which resulted in the contract for the build being brought to an end on or about 7 August 2018. At that time, the following work was not complete:

- (a) boundary block and concrete fence walls;
- (b) cladding – weatherboards;
- (c) cladding – stone;
- (d) cladding – block plaster; and
- (e) cladding – sto finish.

- [19] The Respondent did not provide a record of work for his restricted building work and withheld other documentation on the basis of the commercial dispute. At the hearing, the Respondent provided the Complainants with the Respondent's record of work and the other documentation required for a Code Compliance Certificate application. The Respondent accepted that he could not withhold a record of work because he had not been paid.

- [20] The Respondent accepted that he had breached section 317(1)(d) of the Act on the basis that it is a strict liability disciplinary provision. Counsel noted that there were, however, explanations that the Board should take into account in determining the appropriate penalty, including that the deviations from the building consent were done for rational reasons and on the basis of expert advice and the Respondent's own experience as a builder. Counsel for the Respondent also brought the fraught relationship between the Respondent and [Omitted] as engineer to the contract to the Board's attention as a factor that complicated the build and the processes around making changes during the build.

## Building Issues

- [21] The Respondent gave evidence that he was on site every day anywhere from one hour to a full day except for a period of about two weeks in early February 2018 when the build was at the cladding stage when he was on holiday. When on site he would check progress and the quality of the build and would plan and prepare for the next steps in the build. At the time of the build, the Respondent had some six reasonable sized builds underway in the Auckland region using contracted resources.
- [22] [Omitted], an experienced Nu Wall installer, gave evidence that he met with the Respondent prior to the preparatory work for the installation of the Nu Wall cladding starting. He provided advice to the Respondent on specific Nu Wall requirements for cavity battens and detailing around windows. The Respondent accepted that he had not passed those details onto [Omitted], who had carried out the preparatory work. As a result, [Omitted] estimated that approximately 70% of the battens and wrap had to be replaced and approximately 50% of the windows removed and re-fitted as the work had not been completed in accordance with the Nu Wall cladding specifications, which formed part of the Building Consent. Specifically, the set out of battens and vermin strip was incorrect, as were building wrap overlaps and the windows had to be removed so that the cladding could be installed. The errors resulted in an estimated two to three weeks of extra work. The Respondent noted that the consented plans lacked specific detail about the Nu Wall cladding installation.
- [23] During the build, multiple changes to the design, as consented, were undertaken. The Respondent outlined the process he used to make changes to a building consent, noting that if the change was non-structural, he would use an on-site minor variation process and would engage with the architect and engineer as and when required but that, on this project, the changes had to go through [Omitted] as the engineer to the contract. [Omitted] disagreed. He stated that early in the project, the Respondent was making changes on-site and without any consultation with him or the owner and that when this was discovered, the Respondent was then required to process changes through him ([Omitted]). A foundation and retaining wall change prior was referenced as an example.
- [24] [Omitted] gave evidence that when he attended the site about a month into the build to approve works for a progress claim, he ascertained that the set out of a retaining wall had been changed. The Respondent gave evidence that the change was necessitated when, following the site cut, it became apparent that the retaining wall, as designed at 1.9 metres, had to be raised to 2.8 metres. The Respondent stated that he had engaged with the engineer and had obtained instructions for a change to pole sizes and depths prior to the work being undertaken and that a site note was issued. The Respondent could not recall if he engaged with the Council as regards the change prior to the associated work being carried out. He accepted that a minor variation had not been processed for it but submitted that the work had to be carried out as a matter of urgency to avoid the impact of impending rain. He

stated he informed the Complainants and [Omitted] of the change after it had been carried out.

- [25] Similar evidence was heard as regards a change to the design of stairs to provide the required amount of head clearance. The Respondent stated he dealt with the manufacturer and installer of the stairs about the change but accepted he had not dealt with [Omitted] in relation to it and that he had not done a minor variation for the change. He did process a minor variation for a change of tanking membrane with the Council Inspector after the new product had been installed. He did not consult about the change on the basis that the substituted product was a better product.
- [26] The install of the tanking membrane product behind black walls and the reasons for water penetration was investigated. Evidence was heard that the positioning of a drain coil and a lack of lap at a junction were causes, as was the lack of a drainage connection. The installation of Craft Stone and the underlying substrate was also investigated with regard to possible moisture ingress in a different location to the installation of Craft Stone. The substrate was installed by the Respondent. A specialist installer was engaged to install the Craft Stone. The Respondent stated the work was carried out as per the building consent. The Respondent submitted the water penetrating had resulted from a lack of a capping on adjacent block work and that the work was not complete. The Respondent gave evidence that the cladding was removed, and the tanking was redone so as to satisfy the Council that the work was Building Code compliant.

#### Council Inspections

- [27] The Board obtained a copy of the building consent file, which included the Council inspection records. There were a high number of failed inspections, with the predominant failure reason being a lack of required documentation, including minor variation documentation. The Respondent stated that he was responsible for calling inspections and was on site when they were carried out. If items failed, he would request that the subcontractor responsible attend to the issues. He stated he passed inspection records on, but [Omitted]'s evidence was that he was only provided with records that supported payment claims and that he had to obtain a full record from the Council.
- [28] The Respondent was asked why he did not attend to document requests in a timely manner. The example of a membrane certificate, which was repeatedly sought was given. The Respondent was not able to provide reasons.

#### Health and Safety

- [29] A Council inspection on 26 July 2017 was noted as a fail because the site was not safe. The inspection noted: *The inspection cannot continue as site is unsafe.*



[30] An inspection on 22 November 2017 noted:

*Multiple trip hazards , rubbish all over site , was not able to safely negotiate around site, no safety tag on scaffold Owner to clean site before booking any further inspections.*

[31] The 22 November 2017 inspection was accompanied by photographs showing the state of the site. Samples of those photographs follow:



[32] An inspection on 15 June 2018 continued to record the same issues:

*4....Clean sight... council will not complete any more site visits UNTILL site is clean and scaffold is tagged and deemed safe..... [Omitted] has instructed [Omitted] this is to be asap or site safe with be informed.*

[33] The Respondent acknowledged the site issues and took responsibility for them. He did not have an explanation for them.

#### Closing Submissions

[34] The Respondent stated that he had learnt from the job and accepted the mistakes he had made during the build. He outlined how he had improved his communication processes and provided a number of references from current clients, which praised his building work and processes and noted that he had not experienced the type of issues that arose on this job since. He outlined his passion for building work and reiterated the difficult working conditions experienced at [Omitted]. He apologised to the Complainants.

#### **Board's Conclusion and Reasoning**

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

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section

88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

and **should** be disciplined.

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

#### Negligence – Site Licence

[37] The finding of negligence relates to the Respondent's Site Licence and his overall coordination and oversight of the build. Coordination and oversight are referred to Licensed Building Practitioners Rules 2007 (the Rules) in relation to the competencies required of a Site Licence holder but are not defined terms. The Rules do, however, provide some guidance.

[38] The Rules, in Competency 3 – Organise and Manage Building Projects, note the following competencies:

1.1.3 Describe the relevance of building-related legislation to the construction of Category 1 buildings.

*May include but not limited to – Health and Safety in Employment Act, Construction Contracts Act, Resource Management Act.*

3.1.2 Identify need for and seek clarification and/or additional design documentation from the Design Lead, as required.

3.1.3 Establish a building site and manage ongoing operations.

*May include but not limited to – access, site signage, temporary water, electricity, other facilities, temporary work, compliance with building consent conditions and the Building Code.*

3.1.4 Monitor construction site performance.

*May include but not limited to – monitoring performance, application of time management and quality assurance, ordering, scheduling materials and efficient use of materials.*

[39] From the above competencies, it is clear that many of the issues that arose on site came within the Respondent's purview as a Site Licence holder and, in particular, the failure to pass on instructions as regards the requirements for Nu Wall cladding, the failure to quality check as regards the same, the failure to attend to minor variations and documentation requests in a timely manner and the failure to maintain a safe site. The Respondent accepted responsibility for those failings.

[40] 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>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

- [41] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test<sup>9</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.
- [42] 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>10</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>11</sup>.
- [43] 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.*

- [44] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>12</sup> and be carried out in accordance with a building

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>11</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>12</sup> Section 17 of the Building Act 2004

consent<sup>13</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.

- [45] Turning to seriousness in *Collie v Nursing Council of New Zealand*,<sup>14</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.*

- [46] Given the failings noted in paragraph [39] above, and the Respondent's acceptance of those failings, the Board, which includes persons with extensive experience and expertise in the building industry, finds that the Respondent has displayed a lack of reasonably expected care in his direction and oversight of the building work and in his management of the building site. The failings were not minor or trivial and were not mere inadvertence. This is borne out by the repeated nature of the failings, especially with regard to documentation and site safety.

#### Contrary to a Building Consent – Minor Variations

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

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

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (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.*

- [48] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set outlined above in paragraph [43].

<sup>13</sup> Section 40(1) of the Building Act 2004

<sup>14</sup> [2001] NZAR 74

[49] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

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

- (4) *An application for an amendment to a building consent must,—*
- (a) *in the case of a minor variation, be made in accordance with section 45A; and*
  - (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[51] Section 45A provides a more flexible approach to changes to a building consent for minor variations. Notably, it states:

**45A Minor variations to building consents**

- (1) *An application for a minor variation to a building consent—*
- (a) *is not required to be made in the prescribed form; but*
  - (b) *must comply with all other applicable requirements of section 45.*
- (2) *Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
- (3) *A building consent authority that grants a minor variation—*
- (a) *must record the minor variation in writing; but*
  - (b) *is not required to issue an amended building consent.*

[52] Minor variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a minor variation as:

**3 Minor variation defined**

- (1) *A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.*
- (2) *The following are examples of minor variations and do not constitute an exhaustive list:*
- (a) *substituting comparable products (for example, substituting one internal lining for a similar internal lining):*

- (b) *minor wall bracing changes:*
- (c) *a minor construction change (for example, changing the framing method used around a window):*
- (d) *changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*

(3) *The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

- [53] It is clear from section 45A of the Act that whilst the process for a minor variation is not as onerous as that required for an amendment to a building consent there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the building consent still applies. Most importantly, the building consent authority retains the discretion to refuse a minor variation<sup>15</sup>. To aid the process of applying for a minor variation, most building consent authorities have a minor variation application form.
- [54] The fact that a minor variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than proceed the application. The legislative framework does not allow a minor variation to be carried out and then, once complete, to be retrospectively applied for. In this respect, it must also be borne in mind the potential consequences of a minor variation that has been completed but not yet applied for being refused. The associated building work would either have to be deconstructed or an application for a certificate of acceptance sought<sup>16</sup>.
- [55] It must also be noted, as regards a licensed building practitioner's obligations, that section 89 of the Act places a positive burden on a licensed building practitioner to notify a building consent authority of a breach of a building consent:

**89 Licensed building practitioner must notify building consent authority of breaches of building consent**

- (1) *A licensed building practitioner must, if he or she is of the view that any building work carried out under a building consent does not comply with that consent, notify—*
- (a) *the territorial authority in whose district the building is situated; and*
  - (b) *the owner.*
- (2) *The notification must—*

<sup>15</sup> Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of building consents

<sup>16</sup> Section 96 of the Act allows a Territorial Authority to issue a certificate of acceptance for unconsented building work

- (a) *state that the licensed building practitioner is of the view that building work carried out under the building consent does not comply with that consent; and*
- (b) *state how the building work does not so comply; and*
- (c) *be given as soon as practicable after the licensed building practitioner forms that view.*

[56] In *Tan v Auckland Council*<sup>17</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

[57] The same applies to the ongoing verification of building work against the requirements of the building consent. A failure to notify the Council of changes to the consented documents prior to them being carried out defeats the purpose of the process.

[58] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that has to be proven is that the building consent has not been complied with. No fault or negligence has to be established<sup>18</sup>.

[59] The Respondent accepted his wrongdoing with regard to section 317(1)(d) of the Act. That was a responsible course to take, and it was supported by the evidence the Board received. The acknowledgement will be taken into consideration by the Board when considering matters of penalty, costs and publication.

#### Record of Work

[60] The Respondent also acknowledged his failure to provide a record of work on completion of restricted building work<sup>19</sup> to the owner and the territorial authority as per the statutory requirement under section 88(1) of the Building Act 2004. He accepted that he did not have a good reason for the non-provision.

[61] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work. Each and every licensed building practitioner who carries out restricted building work must provide a record of work. The Respondent was reminded of this obligation and that he

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<sup>17</sup> [2015] NZHC 3299 [18 December 2015]

<sup>18</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>19</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

cannot provide a record of work for restricted building work that was carried out or supervised by another Licensed Building Practitioner.

- [62] The Respondent noted payment issues as the reason why he had not provided a record of work sooner than he did. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

### **Penalty, Costs and Publication**

- [63] 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 decision should be published.
- [64] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### Penalty

- [65] 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>20</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.*

- [66] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>21</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.
- [67] The Respondent accepted his wrongdoing as regards the charges under sections 317(1)(d) and 317(1)(da)(ii) of the Act. The Board made an additional finding with respect to section 317(1)(b) of the Act. Combined, the matters are serious. A

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<sup>20</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>21</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288



commensurate penalty was required. There are multiple mitigating factors. Principal among them is the responsible attitude the Respondent took to the disciplinary hearing. His acceptance or responsibility and willingness to learn from the events and to change his systems and processes warrant a lesser penalty being imposed. Similarly, the Respondent's apology is a mitigating factor, as are the references provided. In this respect, the Board accepted that the Respondent's conduct at the time of the complaint might not reflect his current methods and practices.

[68] Counsel submitted that a modest fine of \$2,000 was appropriate. The Board, based on the above, decided that a fine was appropriate and set it at \$2,500.

### Costs

[69] 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."

[70] 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>22</sup>.

[71] In *Collie v Nursing Council of New Zealand*,<sup>23</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.*

[72] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>24</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.*

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<sup>22</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>23</sup> [2001] NZAR 74

<sup>24</sup> CIV-2011-485-000227 8 August 2011

- [73] 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.
- [74] The Board's normal scale of costs for a half-day hearing is \$3,500. That is an appropriate starting point. The amount is reduced to \$3,000 on the basis of the Respondent's cooperative approach to the hearing.

#### Publication

- [75] 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>25</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.*

- [76] 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.
- [77] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>26</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>27</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>28</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>29</sup>.
- [78] 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>30</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.
- [79] Based on the above, the Board will not order further publication. The matter occurred in 2018, and the effects of publication now could be disproportionate.

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<sup>25</sup> Refer sections 298, 299 and 301 of the Act

<sup>26</sup> Section 14 of the Act

<sup>27</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>28</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>29</sup> *ibid*

<sup>30</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

[80] 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 fined \$2,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (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(I)(iii) of the Act.

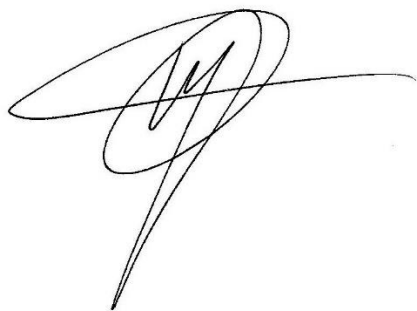
In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[81] 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.

## Right of Appeal

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

Signed and dated this 12<sup>th</sup> day of April 2022.



**Mr 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*

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- (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.*