Before the Building Practitioners Board

	BPB Complaint No. C2-01621
Licensed Building Practitioner:	Ashok Maharaj (the Respondent)
Licence Number:	BP 122781
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	Auckland
Hearing Type:	In Person
Hearing Date:	15 March 2018
Decision Date:	30 April 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Catherine Taylor, Lay Member
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Procedure:

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

Board Decision:

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

The Respondent **has not** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

(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);

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the

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

public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

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

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

[4] 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. It does not have any jurisdiction over contractual matters.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[6] The Board heard evidence from:

[Omitted]	Complainant, Licensed Building Practitioner, Roofing
Ashok Maharaj	Respondent
John Rennie	Technical Assessor

[7] The Complainant confirmed his Complaint. The Complainant, a roofing contractor engaged by the Respondent, alleged that when he attended the site to install concrete tiles on the upper roof of a new dwelling the trusses were out of alignment by up to 50mm and that remedial work had to be completed before the tiles could be installed. He further alleged that when he attended the site to install concrete tiles on a lower roof structure there were similar issues with alignment of trusses and that he refused to install the tiles until such time as the issues had been rectified. His Complaint stated that a new contractor was engaged to complete the roof. The Complainant also gave evidence that he had not seen the Respondent on site when he was carrying out his portion of the building work. He further stated that he had carried out some 7 or 8 builds prior to the present one for the Respondent and that he had never seen him on any of the site, even when his builders were

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

present and were carrying out building work. The Complainant noted that the quality of the building work on the Respondent's jobs has been declining.

[8] The Complainant stated he brought the issues relating to the roof structure to the attention of the building consent authority (BCA) who attended the site, took photographs and noted the issues. The BCA inspection notes dated 8 November 2016 contained the following "Site Instructions":

> *Untidy site – clean and dispose of rubbish appropriately*
>
> *NO FURTHER INSPECTIONS UNTIL SITE IS TIDY*
>
> *Rectify lower level roof trusses as discussed onsite*
>
> *Next inspection BUILDING WRAP where resolved issues will be inspected*

[9] Photographs accompanying the BCA inspection showed the issues with the lower level trusses and the general state of the work site which showed excessive amounts of rubbish.

[10] An earlier BCA inspection of 13 June 2016 also noted on site issues as follows:

> *Install all lintel stud / Jack stud / bottom plate Connections*
>
> *Complete upper level bracing*
>
> *Have Truss plan onsite at next inspection and Install roof strap bracing*
>
> *Add Jack studs under steel Beam Point loads*
>
> *Solid nog above LBW*
>
> *Install all braces – handibracs to be used so can inspect from inside*
>
> *Bolt entry Beam*

[11] The Respondent gave evidence that he cancelled the above inspection in the morning because they were not ready for it but that it went ahead regardless. The BCA form notes the Respondent as being present for it and it does not record the cancellation. The Respondent denied he was present.

[12] The Board engaged a Technical Assessor to assist it with the investigation. The Technical Assessor noted:

> *5.2.2 Compliance of the roof truss installation with the Consent documentation*
>
> *The consented plans are supported by a detailed truss layout plan (Refer to Appendix E) prepared by [Omitted], which is based on a MiTek 20/20 truss design. MiTek trusses consist of pre-fabricated*

gang nail type trusses, which are delivered to site for erection only. The trusses are a fully engineered solution for roof framing, fabricated under factory conditions to maintain uniformity.

Our site inspection revealed that the upper level roof trusses had been installed out of alignment resulting the top chord, or rafters, of the trusses being at differing levels. These differing heights has meant it has been impossible to install tile battens levels without creating excessive tension within the fixings.

The variances within the trusses have also been recorded within the council inspection undertaken by PBC on 04 November 2016, which are supported with photographs included within Appendix D. At the time of our inspection we were unable to verify if these failings had been rectified by the respondent, due to the subsequent installation of the tiles and soffit linings. We were however able to observe visible variances within the tiles and within the spouting that suggests the roof has not been fully rectified.

On the upper roof timber packers were viewed in place below the tile battens to accommodate the differing levels of the rafters. In order to comply with the manufacturers literature, and NZS 3604 a tile batten should be fixed directly to the rafter with a 90x3.15mm power driven nail. Due to the presence of timber packers the fixings (if of that length) will not have sufficient embedment into the rafter.

It has been noted within the council inspection that the rafters of the pre-fabricated trusses had been ripped down as a further means to remediate the level differences. This action will have the effect of invalidating the design and warranty of the trusses. As the trusses are an engineered design solution for roof framing there is very little redundancy built into the timber framing depth and therefore any modifications to them can result in a reduction in structural capacity.

The trusses as installed exceed the tolerances allowed for within the relevant standards (NZS 3604 and MiTek guidance), and the subsequent alterations made to the design has resulted in a structure that does not comply with the building consent.

In order to verify the compliance of the alterations made to them an inspection should be undertaken by the truss design engineer, and any further remedial works carried out as necessary with the benefit of either an amended consent or minor variation to ensure compliance with B1: structure of the Building Code.

[13] The Technical Assessor also made reference to other workmanship issues and failed BCA inspections and provided his opinion that there had been a "general lack of care or supervision of the work that has been undertaken".

[14] The Technical Assessor's report was supported by photographs of the trusses and technical information.

[15] At the hearing the Technical Assessor provided his opinion that the cause of the upper level trusses that were out of alignment (noted as S1, S2 and S3 on the plans) was the use of a hip beam that was offset from the centre of the apex of the trusses. This, in turn, caused the trusses in question to be out of alignment.

[16] The Respondent provided a written statement of evidence. In it he accepted that he was the supervisor of the building work and that rafters had been adjusted under his supervision and that it was less than 10mm of adjustment. He denied that packers had been installed under his direction or supervision. He also submitted that irrespective all work was within the tolerances outlined in NZS3604.

[17] The Respondent noted that he has now gained access to the site and that he is obtaining a report from a truss design engineer as to the compliance of the trusses that have been adjusted.

[18] At the hearing the Respondent stated that he attended the site 4-5 times a day and that he had 3-4 jobs underway in the Papatoetoe region at the time that he was also supervising. The Respondent was not able to provide explanations for the differences in height in the trusses other than the difference in lower roof being as a result of differences in height caused by rough sawn timber. This was rejected as a plausible explanation by the Technical Assessor who noted a possible difference of 2mm in rough sawn dimensions and that the height difference was far more than this.

[19] The Respondent was asked if string lines had been run when the upper level trusses were installed. He stated that at times it is possible to visually confirm without a straight edge and that this was what was done. He stated a line was used on the bottom trusses. Photographs of the lower level trusses with a straight edge on them however showed significant misalignment.

[20] The Respondent did not know who had installed the packers. The Technical Assessor gave evidence that the packers will be compromising the connection of the battens to the trusses and as such that the roof will be at risk from wind-shear and may not meet the requirements of the Building Code and NZS3604.

[21] The Technical Assessor also gave his opinion that the trusses, which were engineer designed, are built with minimal redundancy and any changes would have to be completed in consultation with the design engineer. The Respondent was asked what steps were taken to ensure the changes to the trusses would not compromise them prior to the work being carried out. The Respondent was not able to point to

any engagement with the licensed building practitioner who carried out the design, the truss engineer or the BCA.

[22] Truss documentation provided to the Board noted that any deviations from the design would invalidate the associated Producer Statement. The consented plans noted that no modifications were to be carried out to the trusses.

[23] With regard to the record of work the Respondent gave evidence and submitted that the restricted building work was not completed and that there were ongoing discussions as regards his returning to site. This was substantiated by a recent agreement for him to return to the site and complete outstanding work.

[24] The Respondent was asked about other areas of non-compliance such as penetrations made in floor joists for plumbing pipes that had been installed. He stated that the holes were made by the plumber and the required fittings to strengthen the hole would have been installed as part of remedial work. He stated the plumber should have installed the strengthening. With regard to joist hangers that were not correctly nailed he again stated it would have been picked up and fixed as part of the tidy up of his final checks but that they were trespassed before the work could be completed.

[25] The Respondent variously submitted that the areas of noncompliance could and would be rectified.

[26] The Respondent also provided submissions noting that the Technical Assessor had not contacted the Respondent as part of his investigations. The Technical Assessor outlined that he had tried to contact the Respondent who had not returned calls. The Respondent stated that he thought the contact was just to obtain site access but accepted he did not return subsequent calls. The Respondent did, however, contact the Technical Assessor's office when he received an invoice in error but only in relation to the invoice.

[27] The Board adjourned the matter part heard. A Board minute with directions was issued. It allowed for further evidence to be filed by the Respondent with regard to the compliance of the trusses.

[28] The Respondent filed a signed statement from [Omitted] the owner and operator of a truss manufacturer. He noted that he had attended the site and provided his opinions that:

(a) It is acceptable practice for minor adjustments to be made to the truss off site manufacture. This does not affect the compliance with the building consent provided it is within tolerance. My investigation of the roof trusses reveals that any adjustment is within tolerance;

(b) My conclusion therefore is that the adjustments do not materially affect the structure and integrity of the roof truss construction as [Omitted] *so as to make*

that structure unsafe and that the adjustments are within allowable limits so that the building consent does not require variation;

(c) The use of packers is not recommended. Mr Maharaj and his team deny using packers. However, this can be remedied by the installation of another piece of timber alongside of the saddle trusses.

[29] [Omitted] also provided his opinions on the Technical Assessor's report as follows:

Photos 9 and 10 - Temporary nogs between trusses are not required and do not affect the structural integrity of the truss. Temporary nags such as this are normally removed at completion of construction.

Photos 11 and 12 - This is normal construction with the bottom cord of the Jack trusses leve l with the mid-floor so 35mm strapping.

Photo 13 - This is showing a correct cyclone tie-down in place as per trusses plan

Photo 14 - This shows wire-dogs in place as required as the CPC connectors are not required on all trusses because of differing up lifts

Photo 25 - Joist hangars cut around the bolt fixings is a limited way to get around this problem and in my experience is the usual way practiced by other builders

Photo 26 - Plumbers have drilled through the joist - this is not acceptable and will have to be rectified.

Board's Conclusion and Reasoning

[30] 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); and

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)

and should be disciplined.

[31] The Board has also decided that the Respondent **has not** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

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

Negligence and/or Incompetence

[33] The Board accepts that the Respondent's role in the build was as the supervisor. The question for it is whether the Respondent has been negligent or incompetent as regards his supervision of the building work.

[34] Supervise is defined in section 7[6] of the Act. The definition states:

> *supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*
>
> *(a) is performed competently; and*
>
> *(b) complies with the building consent under which it is carried out.*

[35] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[36] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992[7]. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

> *"As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge*

[6] Section 7:
supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—
(a) is performed competently; and
(b) complies with the building consent under which it is carried out.

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

> *that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations."*

[37] The Board, in considering whether the Respondent has supervised building work in a negligent or incompetent manner also needs to have regard to the meaning of those terms. In *Beattie v Far North Council*[8] Judge McElrea provided guidance on the their interpretation:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
>
> *[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*
>
> *[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

[38] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*[9] as regards the threshold for disciplinary matters:

> *[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.*

[39] There was clear evidence before the Board that building work had been carried out in a negligent manner and in a manner that was not in accordance with consent documentation. In this respect the Board prefers the evidence of the Technical Assessor to that of [Omitted] and notes that whilst [Omitted] has considerable experience he is not an engineer nor a qualified or licensed person and has not supported his assertions with calculations or by reference to acceptable solutions or verification methods. No producer statements have been issued.

[40] The trusses were installed out of alignment. This was a fundamental error and one that a supervising licensed building practitioner performing their role as supervisor should have identified at the time.

[41] The Respondent should have also identified that the remediation undertaken was not appropriate. The Board did not accept the Respondent's evidence that he did not

[8] Judge McElrea, DC Whangarei, CIV-2011-088-313
[9] [2001] NZAR 74

know who had installed packers. It found the Respondent to be evasive in his answers and that his evidence was inconsistent with documentation and other testimony before it. The Board also observed that the BCA documentation notes that the truss plans were not on site during the 13 June 2016 inspection and as such it is difficult to see how the trusses could have been appropriately installed without such documentation.

[42] Even if the Board had accepted the Respondent's evidence that he did not install the packers the fact remains that he was the supervising licensed building practitioner and, as such, he should have noted the noncompliant work and taken steps to rectify it. The Respondent's submission that he will attend to rectification of the packers comes too late.

[43] The Board accepts that issues can arise during a build and it does not always follow that a licensed building practitioner has been negligent because they have arisen. At the same time a licensed building practitioner should always be aiming to get it right first time and not to have to rely on remediation.

[44] When issues do arise the Board needs to look at the circumstances under which they arise and how they are dealt with when they do arise. Factors such as the following need to be taken into consideration by the Board:

(a) the extent of the error, omission or noncompliance;

(b) whether failings by the Respondent in their planning and execution of the building work have contributed to the issue arising or not; and

(c) whether the issues are identified and dealt with in a timely fashion as part of the build and quality assurance process used.

[45] Generally the more significant the failing the more likely a disciplinary outcome will follow. Similarly where issues have to be brought to the licensed building practitioners attention it is more likely a disciplinary outcome will follow but the Board will take into account the overall circumstances leading up to and after the issue occurring into account.

[46] In this instance the noncompliance was not identified by the Respondent. Rectification will require the removal of the roof and as such major and invasive work will be required. The changes to the trusses are also matters that go to the fundamental structure of the dwelling. Changing their design and thereby their performance is a serious matter and in this respect the Board notes the consent documentation states the trusses were not to be altered. Given these factors the Board does not accept the Respondent's submissions as regards rectification.

[47] The Board does note that the Respondent has provided an opinion to the effect that the trusses are, notwithstanding the changes, still compliant. Once again even if this transpires to be the case the critical point, as regards the Respondent's negligence is that the issues should not have occurred in the first place and most likely would not have had the Respondent provided the appropriate supervision.

[48] The Board, which includes persons with extensive experience and expertise in the building industry, therefore considers the Respondent has displayed a lack of reasonably expected care in his supervision of the building work.

[49] The Board also notes that the Respondent has made changes to the consented design without using any form of process. He has, since the work to change to trusses was carried out sought and obtained an opinion as to the compliance of the trusses. As noted earlier it has come too late. The checks should have been made prior to the work being undertaken. This matter will, however, be dealt with as regards the allegation that the Respondent has carried out building work that is contrary to a building consent.

[50] Finally the Board also notes the other noncompliance issues and the health and safety hazards present at the site. Whilst they were not as serious as the matters pertaining to the trusses they do point to a general lack of adequate supervision by the Respondent.

Contrary to a Building Consent

[51] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[52] In *Tan v Auckland Council*[10] 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.*

[53] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[54] In this instance changes were made to the trusses as outlined above. The changes were carried out without notifying any of the designer, the truss engineer or manufacturer or the BCA. The manufacturer's approval is too late.

[10] [2015] NZHC 3299 [18 December 2015]

[55] The trusses were installed in a manner that was contrary to the building consent and the remedial building work carried out to modify them was also clearly contrary to the building consent. The notations to the building consent as regards the trusses is, of itself, sufficient to make this finding.

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 work[11].

[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 C2-01170[12] 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 …".

[61] 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 recent District Court decisions[13] it has, however, been held that where there is a change in licensed building practitioner during a build there is an obligation on the owner under section 87 of the Act to notify the Territorial Authority of a change of licensed building practitioner and that this can be taken into account when considering whether there the requirement for a record of work from the former or original licensed building practitioner has been triggered. In those cases there were commercial disputes, building work in question had not been completed and there was a possibility that the original licensed building practitioner might return to carry out further building work.

[11] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[12] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[13] *Ali v Kumar et al* [2017] NZDC 23582 and *Bell v MBIE et al* [2017] NZDC 23847

[63] Similar facts apply in this case and the Respondent has given evidence that he is soon to return and recommence the building work. On this basis the Board finds that *Ali* and *Bell* apply and that a record of work is not yet due as completion has not yet occurred.

Penalty, Costs and Publication

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

[65] 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

[66] 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*[14] 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.*

[67] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[15] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[68] The matters before the Board were very serious in the nature. A commensurate penalty is warranted and as such the Board considers that a suspension of the Respondent's licence is warranted to not only punish the Respondent but also to deter others from such conduct.

[69] Based on the above the Board's penalty decision is that the Respondent's licence be suspended for a period of no less than 6 months.

[14] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[15] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Costs

[70] 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."

[71] 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[16].

[72] In *Collie v Nursing Council of New Zealand*[17] 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.*

[73] Based on the above the Board's costs order is that the Respondent is to pay the sum of $3,000 toward the costs of and incidental to the Board's inquiry.

Publication

[74] 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[18]. 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.*

[75] 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.

[76] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[19]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[20]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[21]. The High Court provided

[16] *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.
[17] [2001] NZAR 74
[18] Refer sections 298, 299 and 301 of the Act
[19] Section 14 of the Act
[20] Refer sections 200 and 202 of the Criminal Procedure Act
[21] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*[22].

[77] 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[23]. 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.

[78] Based on the above the Board will order further publication.

Section 318 Order

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

Penalty:	**Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of 6 months and the Registrar is directed to record the suspension in the register of Licensed Building Practitioners.**
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(1)(iii) of the Act.** **In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.**

[80] 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

[81] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **18 May 2018**. 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.

Right of Appeal

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

[22] ibid

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

Signed and dated this 30th day of April 2018



Richard Merrifield
Presiding Member

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[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.*