

Before the Building Practitioners Board

	BPB Complaint No. C2-01769
Licensed Building Practitioner:	Carolus Evers (the Respondent)
Licence Number:	BP 109298
Licence(s) Held:	Carpentry and Site AOP1

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	Christchurch
Hearing Type:	In Person
Hearing Date:	11 April 2018
Decision Date:	Date

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2

Appearances:

Nichola Donovan 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.

Board Decision:

The Respondent **has** committed disciplinary offences under section 317(1)(b), 317(1)(d) and 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 Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

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 committed⁵. 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] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Carolus Evers	Respondent
[Omitted]	Complainant
[Omitted]	Witness for the Respondent, [Omitted] Employee
[Omitted]	Witness, [Omitted]

- [7] The Board had summonsed Hugh Nimmo of the Christchurch City Council who was the building inspector who had carried out inspections and provided Site Notices. Mr Nimmo failed to appear and could not be contacted on the day of the hearing.

- [8] The Respondent was, at the time of the Complaint, an employee [Omitted]. The Complainant had engaged [Omitted] to undertake renovations to a residential dwelling. A building consent had been issued on 7 June 2016 for the building work. The Respondent was the licensed building practitioner that [Omitted] instructed to carry out the onsite building work. The building work included restricted building

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

work. The Respondent carried out and supervised building work between 23 February 2017 and 14 June 2017.

[9] The Complainant alleged issues with the build. In particular that required inspections were not completed; pre-tile tanking and pre-line inspection for shower had not been completed and wanz bars, new head flashings and scribes were not installed as per the consented plan for windows and doors; and a deck was built hard to the cladding. Council documentation was provided in support of the Complaint and further documentation was obtained from the Council. The documentation included the Building Consent, Consented Plans and Site Notices issued.

[10] The Building Consent noted a Schedule of Specified Inspections which included:

201 Pre Pour Foundation

213 Flashings

205 Pre Line including Plumbing

208 Drainage

210 Final Inspection

[11] The Schedule also noted that a copy of the approved plans must be kept on site.

[12] The Site Notices all stated that "All stamped consented documentation has been provided for this inspection". Specific relevant notes from the Site Notices were:

Site Notice	Notes
30 March 2017	DIRECTIVE Ensure Reveal fixings as per E2/AS1 section 9.1.10.8.
1 August 2017	Required inspections have not been completed. Pre tile tanking and preline for shower not completed. Flashings: Windows: Wanz bars, new head flashings and scribes not installed as per plan. Doors: Wanz bars, new head flashings and scribes not installed as per plan. Support bars in place: Wanz bars, new head flashings and scribes not installed as per plan. Window Head: Wanz bars, new head flashings and scribes not installed as per plan.

Site Notice	Notes
	<p>Sill flashing type: None sited. Required to new head flashing</p> <p>SUMMARY</p> <p>Inspection outcome: Not approved to continue: A RE-INSPECTION IS REQUIRED.</p> <p>Next inspection required:</p> <p>205 - Pre line including plumbing</p> <p>213 - Flashings</p> <p>Summary of inspection undertaken: Retrospective flashing inspection and general look over the job.</p>
10 August 2017	<p>Failed Items</p> <p>GENERAL This was an onsite meeting to discuss the missed pretile tanking inspection , the change of floor plan but mainly the window installation It was decided that an amendment would be applied for to cover these items.</p> <p>I pointed the builder and home owner towards E1 for the tile shower, E2 for the window and door installation, schedule one for the window and door installation and section 112 of NZBC as I thought these would help with the amendment.</p> <p>Previous inspections completed: Required inspections have not been completed.</p>

- [13] The Respondent provided a written response to the Complaint. in summary he stated:
- (a) [Omitted] had provided him with a set of plans for the renovation work to be performed at the property which, in turn, had been provided by the homeowner;
 - (b) the Respondent understood the plans were a complete set of plans detailing everything needed to complete the job to the building code including the detail for the installation of the windows. He noted information that he thought should have been on the plans but was not;
 - (c) he was concerned that there were no details regarding window flashings or how to install the windows, and could foresee compliance issues arising. He requested full plans on numerous occasions but the first time he saw the full set of plans was as a result of the Complaint;

- (d) as an employee of [Omitted] he was not responsible for work that is left to be done or done in his absence;
- (e) he was not provided with a schedule of inspections, and did not receive copies of the consent documents or the building consent and was thus unable to schedule the first pre-line inspection;
- (f) he was unable to remove the cladding from the windows as the homeowner had not allowed for this in their budget;
- (g) the council inspector advised him to take a photo of instructions relating to window installation that the inspector had on his laptop and the inspector did not indicate that following these installation instructions would result in the work failing to comply with the building code
- (h) he was not responsible for the inspections required for the bathroom;
- (i) the architect did not provide him with the necessary advice in relation to the installation of the windows to enable compliance with the building code;
- (j) the deck was completed following instruction from the homeowner but was not in the building consent and he was not working on the deck at the time it was built without the 12mm gap.

[14] The Respondent also provided a copy of the plans that he was provided with. They were not stamped as “Approved Building Consent Plans”. The plans he provided did not contain page A-08 which was in the Approved Building Consent Plans. That page contained details on window and door installation. The Respondent’s set of plans did contain page A-07. That page contained the following notations:

Please Note Doors and Windows to be installed in a accordance to manufacturers specification and E2/AS1
All Glass in all doors and windows to wet areas is to be safety glass complying with NZS4223
All windows to comply with the New Zealand Building Code Compliance Documents and Handbooks 2008 and New Zealand Standard (NZS) NZS 4211:2008 Specification for performance of windows NZS 3504:1979 Specification for aluminium windows; NZS 3604:1999 Timber Framed Building AS/NZS 1170.0:2002 Structural design actions – General principles NZS 4223.3:1999 Code of practice for glazing in buildings – Human impact safety requirements; and AS/NZS 4666:2000 Insulating glass units
All Glass in windows to doors and glazing to wet areas to be safety glass complying with NZS4223

- [15] The Respondent also provided a written response to the allegation that he did not provide a record of work. He stated he was taken off the job before the work was finished.
- [16] At the hearing the Complainant spoke to his Complaint and the financial impact of the alleged failings. Counsel for the Respondent provided an opening submission which added to the Respondent's initial written response to the Complaint and expanded further on the attempts made to obtain plans, difficulties created by the owners remaining in occupation whilst the building work was carried out, issues with installing the windows and doors without removing cladding and that a missing bathroom angle bracket was a minor matter. Counsel also noted that no section 87(1) notice of a new licensed building practitioner had been given and that once the Respondent ceased to be involved it fell to his employer to ensure a record of work was done by whomever completed the work. It was, however, accepted by the Respondent that when further inquiry was made as regards the requirement to provide records of work Counsel noted that its non-provision was an oversight, was not malicious and that it was provided as soon as the obligation came clear.
- [17] The Board heard evidence from [Omitted] that the job was priced on the basis of pre-consent plans. He stated that he asked for a full set of plans on multiple occasions and was advised by the Complainant that they had been provided. He was not able to locate a full set. No enquiries were made of the building consent authority by him or by the Respondent to obtain a set of plans from them. The Complainant stated they had a full set on site but they were not in a place that made them accessible to workers on site.
- [18] The Board questioned the Respondent as regards the council approved plans and the plans that he was working with which did not have the approval stamp affixed and why he did not realise that he was not working off the approved plans. The Respondent did not provide an explanation as to why he did not work from the approved building consent plans.
- [19] The Respondent stated he did not have a schedule of building inspections. He did, however, obtain a building consent number prior to the first inspection that was carried out. In questioning the Respondent stated he determined what inspections to call for on the basis of his past experience with inspections.
- [20] [Omitted] was asked why the work was allowed to progress without the approved plans. He stated they had to move the job forward.
- [21] The Respondent was also questioned as regards the notations on page A-07 of the non-approved plans that he was working from and in particular the notation that the windows and doors were to be installed in accordance with E2/AS1. The Respondent did not know what E2/AS1 was.
- [22] The Respondent described the methodology used to install the windows. It was stated that the inability to remove cladding compromised the method which was not

as per E2/AS1. In questioning the Board heard evidence that the removal of the cladding had not been allowed for in the price and that there had not been a client instruction to not remove the cladding to install windows and doors.

- [23] With regard to the deck the Respondent stated that he did not install the decking that is hard up to the cladding and that he had left the job with the deck part complete. The Complainant accepted that the Respondent may not have installed those lengths of decking.
- [24] In respect of the shower the Respondent and [Omitted] gave evidence that the tiler had said they could just rely on a PS3. They did not have the schedule of inspections and so did not know that a pre-line inspection was required.

Board's Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in a negligent and incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

and should be disciplined.

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

Negligence and/or Incompetence

[27] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[28] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

- [29] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*⁹ it was stated as “*an inability to do the job*”.
- [30] The New Zealand Courts have stated that assessment of negligence and/or incompetence 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.
- [31] 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.
- [32] 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.*

- [33] 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

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

¹³ Section 17 of the Building Act 2004

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.

- [34] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

- [35] There are two aspects for the Board to consider in relation to negligence and/or incompetence. The first is carrying out the building work without the approved consented plans, the second is the manner in which the windows and doors were installed.
- [36] Looking at the first issue, the failure to obtain and use the approved consented plans the Board notes section 40(1) of the Act requires that "A person must not carry out any building work except in accordance with a building consent". Added to this are the provisions of section 14E of the Act:

14E Responsibilities of builder

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

- [37] The above makes it clear that there is an obligation to build in accordance with the building consent and that those obligations extended to the Respondent.
- [38] Clearly, in order to comply with those obligations, the Respondent needed to have the approved plans on site as the approved plans form a critical part of a building consent. He did not and it would have been obvious to a competent licensed building practitioner that he did not have the approved plans. Approved plans are stamped with a prominent approval statement. The plans the Respondent was

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

working from did not have that stamp. The result of this was that he did not have a critical page of the approved plans – page A-08.

- [39] The risks of proceeding with building work without the approved plans are numerous and can be very serious. Plans can change quite significantly and dramatically from pre-consent to post consent. This is what has occurred here. Critical and detailed information as regards how windows and doors were to be installed was inserted. What followed was that the Respondent, not knowing of those details, has installed the windows and doors in a manner that does not accord with the building consent. He has, as a result of not having the building consent, also failed to obtain inspections. These are serious matters.
- [40] The fundamental point is that the Respondent should not have carried out any building work before obtaining the building consent and the approved plans. In proceeding with building work in those circumstances he has been negligent in that his conduct has fallen below expected standards and incompetent in that the evidence has shown that he was ignorant of the difference between approved and non-approved plans.
- [41] Turning to the manner in which windows and doors were installed the Board was very concerned that the Respondent was ignorant of what E2/AS1 is. The document is a fundamental and well used acceptable solution and is available for free from public sources. All licensed building practitioners should not only know and understand it but also should have a readily accessible copy. In not knowing of this document the Respondent has shown himself to be incompetent.
- [42] Had the Respondent known of E2/AS1 then he would have seen that page A-07 of the plans he was working from did contain detailed instructions on how to install the windows and doors. They were to be installed in accordance with manufacturer's instructions and E2/AS1. The plans also contained numerous other standards that could and should have been turned to for details on how they were to be installed. In failing to observe and follow those instructions the Respondent has been both negligent and incompetent.
- [43] The Board accepted that the issues with the deck were not caused by the Respondent and that the issues as regards an angle bracket in the bathroom were minor.
- [44] Given the findings on the other matters, however, the Board, which includes persons with extensive experience and expertise in the building industry, finds that the Respondent has departed from what the Board considers to be an accepted standard of conduct and has therefore been negligent. The Board also finds that the Respondent has been incompetent in that he displayed a lack of knowledge and skill. The Board also finds that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

[45] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40 of the Act.

[46] In *Tan v Auckland Council*¹⁶ 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.

[47] The Site Notices issued by the Council are, of themselves, sufficient evidence that the building work was not carried out in accordance with the building consent and whilst there was some evidence that a building inspector had given site instructions that approved the manner in which windows and doors were installed there is no documentation to verify this. Moreover even if this was the case the change from the building consent would have required, at the least a minor variation under section 45A of the Act or, more likely, an amendment to the building consent and there was no evidence that any steps had been taken to obtain a minor variation or an amendment under section 45(4)(b) of the Act or even that the Respondent had turned his mind to it.

[48] The Board does note that the charge is closely linked to that of negligence and incompetence under section 317(1)(b). This will be taken into consideration when considering penalty.

Record of Work

[49] 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 work¹⁷.

[50] 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.

[51] The Board discussed issues with regard to records of work in its decision C2-01170¹⁸ 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

¹⁶ [2015] NZHC 3299 [18 December 2015]

¹⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [52] 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.
- [53] 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 ...”.
- [54] 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. Contractual disputes or intervening events can, however, lead to situations where the licensed building practitioner will have to provide a record of work even though all of the intended restricted building work has not been completed.
- [55] This is what has occurred in the present case. The Respondent’s involvement in the restricted building work came to an end on 14 June 2017. An undated record of work was provided by way of the Registrar as part of the Complaint process between the completion of the Registrar’s report on 5 January 2018 and the Board’s consideration of that report on 31 January 2018.
- [56] The Respondent has raised that the Complainant did not provide a section 87(1) notice. In recent District Court decisions¹⁹ it has 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.
- [57] Similar facts apply in this case except that the Respondent, on his own evidence, knew that his involvement had come to an end and that his employers would be continuing with the build without him. As such the Board does not consider that *Ali* or *Bell* applies.
- [58] The Respondent has also stated that he was not asked for a record of work. In this respect it must be noted 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. The Respondent should have acted of his own accord and not waited for others to remind his of his obligations.

¹⁹ *Ali v Kumar et al* [2017] NZDC 23582 and *Bell v MBIE et al* [2017] NZDC 23847

- [59] Given the above and the fact that a record of work was not provided until early 2018 and then only after a complaint had been made the Board finds that the disciplinary offence has been committed.
- [60] 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. The possible good reasons have been dealt with above.

Penalty, Costs and Publication

- [61] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [62] 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

- [63] 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*²⁰ 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.

- [64] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²¹ 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.

²⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [65] The matters before the Board are serious and the most disconcerting feature is the finding of incompetence. The Board is very concerned that the Respondent has displayed a lack of knowledge as a licensed building practitioner.
- [66] At the same time the Board does acknowledge that the Respondent was an employee and that the actions of his employer have impacted on him.
- [67] Given the finding of incompetence that Board considers that an order that he undertake training under section 318(1)(e) of the Act is the most appropriate course of action. Based on this the Board will order that the Respondent undertake and complete the following BRANZ E-Learning Modules within three months of the Board's penalty decision being finalised:
- (a) Introduction to the LBP Scheme;
 - (b) The Building Consent Process; and
 - (c) Restricted Building Work.
- [68] The Board also strongly recommends that the Respondent obtain and study a copy of E2/AS1 available at:

<https://www.building.govt.nz/building-code-compliance/e-moisture/e2-external-moisture/acceptable-solutions-and-verification-methods/>

And of the Understanding the Regulatory Environment Handbook available at:

<https://www.lbp.govt.nz/assets/documents/understanding-regulatory-environment.pdf>

- [69] The Respondent should note that if the Respondent fails to comply with the Board's penalty order within the time frame indicated then it will suspend the Respondent's licence in accordance with section 317(1)(b) until the earlier of the training being satisfactorily completed or the expiry of a period of 12 months.

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 case²².
- [72] In *Collie v Nursing Council of New Zealand*²³ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

²² *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.

²³ [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.

[73] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 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 Act²⁴. 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 1990²⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁷. 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*²⁸.

[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 interest²⁹. 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 not order further publication.

Section 318 Order

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

²⁴ Refer sections 298, 299 and 301 of the Act

²⁵ Section 14 of the Act

²⁶ Refer sections 200 and 202 of the Criminal Procedure Act

²⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁸ *ibid*

²⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Penalty: Pursuant to section 318(1)(e) of the Building Act 2004, the Respondent is ordered to undertake and complete, to the satisfaction of the Registrar, the following specified training within three months of this order:

- (a) BRANZ E-Learning Module – Introduction to the LBP Scheme;
- (b) BRANZ E-Learning Module – The Building Consent Process; and
- (c) BRANZ E-Learning Module – Restricted Building Work.

If the Respondent fails to successfully complete the training specified in this order then pursuant to s 318(1)(b) of the Act, the Respondent's licence will be suspended until the earlier of the Respondent completing the training to the satisfaction of the Registrar or the expiry of a period of 12 months and the Registrar will be 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 \$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(1)(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.

[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 **29 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 Actⁱⁱ.

Signed and dated this 8th day of May 2018


Chris Preston
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.*