

Before the Building Practitioners Board

	BPB Complaint No. CB25478
Licensed Building Practitioner:	Jason Anderson (the Respondent)
Licence Number:	BP132442
Licence(s) Held:	Design AoP 2

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	Blenheim
Hearing Type:	In Person
Hearing Dates:	10 March 2021 and 28 July 2021
Decision Date:	9 August 2021
Board Members Present ¹ :	
	Mr C Preston, Chair (Presiding)
	Mr M Orange, Deputy Chair, Barrister
	Mrs F Pearson-Green, LBP, Design AOP 2

Appearances:

P.J. Radich and S.A. Wadworth, Radich Law, 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 a disciplinary offence under section 317(1)(b) of the Act.

¹ Mr R Dunlop, Retired Professional Engineer, was present at the first hearing. His appointment as a Building Practitioners Board Member had come to an end prior to the second hearing date.

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Summary of the Board’s Decision

- [1] The Respondent carried out and supervised building work (design work) in a negligent manner. He is fined \$5,000 and ordered to pay \$8,000 in costs.

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 Regulations² to hold a hearing in relation to building work (design work) at multiple addresses in the Marlborough region³. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have 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:

- (a) design work was substandard;
- (b) drawings and specifications were incomplete and/or did not relate to the specific project;

² The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

³ The hearing related to building consent applications for BC190963, BC191122, BC191220, BC191230, BC191377, BC191378, BC200027, BC200030, BC201272, BC200277; and BC200231

- (c) drawings and specifications did not meet the building code and/or were contradictory; and
- (d) there may have been an unacceptable number of requests for information from the Council.

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*⁴ and in New Zealand in *Dentice v Valuers Registration Board*⁵.

[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*,⁶ Collins J. noted that:

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

[5] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁷:

... 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.

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

⁶ [2016] HZHC 2276 at para 164

⁷ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Inquiry Process

- [8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Background to the Hearing

- [10] The hearing was originally convened on 10 March 2021. The hearing proceeded with Counsel present⁸, and evidence was received. The evidence before the Board included the Board's hearing file. Counsel submitted that parts of the Board's hearing file had not been disclosed to the Respondent or were missing. In particular, Counsel submitted that the Respondent was not aware of and was not prepared to answer allegations in respect of:
- (a) documentation that was only available by way of a link contained in and referred to in the complaint; and
 - (b) additional rejected building consent applications submitted by the Respondent, which the Complainant had raised after the Board had made its regulation 10 decision to proceed to a hearing (BC201272, BC200277 and BC200231).
- [11] The Board decided that the hearing would be adjourned part-heard to allow Counsel and the Respondent to review the additional documentary evidence that they were not in possession of. Directions were issued for the documentation to be provided.
- [12] A transcript and recording of the evidence heard at the first hearing date was provided to Counsel for the Respondent.
- [13] The Board, in addition to adjourning the matter, also decided that it would, pursuant to section 322(1)(d) of the Act⁹, appoint a Special Adviser to assist the Board in its inquiries. Mr Ron Pynenburg was appointed. He was instructed to review the original building consent applications (as submitted and prior to any requests for information or any notices of refusal being issued) and to provide his expert opinion as to the

⁸ The Respondent was represented by M Radich of Radich Law at the first hearing date.

⁹ 322 Board may hear evidence for disciplinary matters

(1) In relation to a disciplinary matter, the Board may—
(d) appoint any persons as special advisers to assist the Board (for example, to advise on technical evidence).

quality and compliance of those applications. In particular, the Special Adviser was instructed to detail instances where in his or her opinion:

- (a) the building consent would not, on reasonable grounds, have satisfied the provisions of the building code if the building work was properly completed in accordance with the plans and specifications that accompanied the applications; and/or
- (b) the Respondent's design work was substandard; and/or
- (c) the Respondent's drawings and/or specifications were incomplete and/or did not relate to the specific building consent application.

[14] Mr Pynenburg's report dated 31 May 2021 was provided to the Board and the Respondent prior to the resumed hearing.

[15] On 27 July 2021, Counsel for the Respondent filed a Statement of Evidence for the Respondent and Submissions from Counsel.

[16] The hearing proceeded on the basis that the Respondent accepted he had been negligent, and the evidence focused on mitigating factors.

Evidence

[17] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed¹⁰. 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.

[18] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

Jason Anderson	Respondent
[Omitted]	Complainant
Ron Pynenburg	Special Adviser, Registered Architect

The Special Adviser's Report

[20] Mr Pynenburg reviewed the building consents and provided a table of his opinions for each. He noted:

¹⁰ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

My comments and the examples recorded are by no means an exhaustive list, and there is much more within the application documentation that could be included as examples of substandard and non-compliant design work. The examples I have included are those that were relatively obvious to me from reading the documents and that did not require too much effort or research to establish that there was substandard work and/or that it was likely that code non-compliance would occur if the documentation was followed.

With this approach to the analysis, I am satisfied that what I have seen and recorded is by far not all that is cause for concern, but is more than sufficient to support the opinions I present to the Board.

[21] Mr Pynenburg provided his high-level opinions:

4.3.1 My review covered three components of the applications:

- architectural specification*
- architectural drawings*
- structural design co-ordination*

In my expert opinion, and with respect to these three components, all of the applications fall short of the required quality and compliance required to obtain a building consent under the Building Act, as well as to enable a competent builder to carry out the required building work.

4.3.2 The Board identified three grounds, recorded in 2.1, for which it requested examples, and these are provided in detail in the Appendices. The majority of the examples provided are representative of either two or all three of the grounds.

4.3.3 In my opinion, the short-comings in both quality and compliance arise in one or more of the following areas:

- 1. Interpretation of site contours, including the relative level at which the house is to sit on the site, and the accurate representation of building floor levels, and existing and/or proposed ground levels;*
- 2. Interpretation of other consultants' designs, leading to either accurate integration into the design or undertaking the necessary re-design of either other consultants' and/or architectural designs to achieve a co-ordinated design;*
- 3. The provision of architectural details incorporating all architectural and structural elements to accurately show an integrated detail including relative locations and necessary fixings;*

4. *Missing, inadequate, incomplete, irrelevant and/or conflicting design work within the document set, leading to uncertainty as to what the design intent is, what is to be built, and/or what is to be assessed for code compliance;*
5. *Interpretation and use of acceptable solutions, standards, design tools and/or manufacturers' literature to produce not only correct design work to enable building work to be carried out, but also sufficient to enable code compliance to be assessed;*
6. *Drawing organisation and content to enable confident navigation of them to understand what is to be built, and where all the relevant information, including that within the specification and/or other consultant's design documents, can be found;*
7. *Specification structure and content to enable confident navigation and to have it complementary to the drawings.*

Counsel's Submissions

[22] Counsel opened, noting that the Respondent accepted he must account to the Board and that the approach he was taking to the second hearing was aiming at an efficient resolution of the matter.

[23] Counsel for the Respondent's written submissions covered the Respondent's business and personal circumstances during the period over which the building consents were filed. He noted:

7. *In his time in business from October 2017 to 22 July 2021 the Respondent has been extraordinarily productive. From a small practice he has generated a large volume of work across the top of the South Island. None of this work has attracted a client complaint or a builder complaint to the Board but it has attracted the complaint of Marlborough District Council. No other Local Authority has complained.*

[24] At the hearing, Counsel put it as the Respondent having been a victim of his own success.

[25] Counsel noted, both at the hearing and in his written submissions, that the Respondent accepted that he had been negligent, but not incompetent:

8. *The Respondent accepts that he has been negligent in the respects outlined in his most recent evidence. He accepts that this negligence has been both in relation to his own work and his supervision of the work of his employees. He does not accept that he is incompetent in the sense that that expression has to be interpreted in this context.*

[26] Counsel made submissions to put the Respondent's conduct in context:

19. *The reality of human failings means that it is accepted in life and by professional bodies that sometimes a professional will make mistakes and these, judged objectively, will amount to negligence. This does not mean that these professionals are necessarily incompetent or necessarily deserving of professional discipline. Moreover, in all professions and businesses there are quality ranges with some deliverers of services performing better than others but leaving the others nevertheless within the range of acceptability. Often there is a relationship between cost and quality of performance. High quality detailed exacting work takes time and this is reflected in cost. Some people are not able to carry the cost of high quality delivery. In the building industry however, all deliverers must meet a minimum standard. It is evident from the Special Advisor's Report that the standards he is looking for are above the minimum standards and in some respects are aspirational standards rather than mandatory standards. The Special Advisor is a Registered Architect of many years' experience and will have different competencies and standards to those of a Licensed Building Practitioner who is a designer. Care therefore needs to be taken to ensure that the standard to be expected of the Respondent is correctly identified.*
20. *Within the range of allegations made against the Respondent there are some where he readily accepts that he has been negligent in his own work or in supervision. There are others in more of a grey or arguable area. Then there are others which he disputes. However, the Respondent accepts that when the individual matters where he accepts negligence are conflated, then the aggregate of that negligence takes these matters over the threshold to a point where a disciplinary penalty under Section 318 can be applied.*

[27] The focus of the submissions was that there is a continuum of design quality and, with it, a range of associated fees. Examples were put forward of the quality of the designs of engineers and registered architects versus a design AoP 2 person. It was, however, accepted that there is still a minimum standard that must be reached. The point made was that the Respondent should be judged against his peers, and not other, more qualified, design professionals.

[28] It was also submitted that the Respondent had, notwithstanding the building consents under investigation, completed some high-quality design work, and examples of homes constructed using the Respondent's designs were provided. Counsel submitted that current projects were proceeding without issue.

Respondent's Evidence

[29] The Respondent, in his Statement of Evidence, also accepted that his conduct had not reached an acceptable standard:

1. *I wish to make it clear at the outset that having seen the Special Advisor's report dated 22 June 2021, I accept that some of my work has not been up to standard. My focus now is on improving my performance, which I believe I have done, and in providing a good service to my clients.*

[30] The Respondent did not, however, accept all of the Special Adviser's opinions. In particular, the Respondent, whilst accepting that there needed to be better consistency between his plans and the engineer's plans, submitted that engineering plans take precedence and that builders would have known to work from the engineer's plans where there was inconsistency.

[31] Mr Pynenburg's opinion was that a builder should not assume that the engineer's designs are correct or should take precedence and that if there is a conflict, they should make enquiries to seek clarification. It considered that it was important that the designer, as the lead in the building consent development and submission, takes control of the documentation and makes sure that respective parts are consistent with each other.

[32] The Respondent's Statement also put forward his perspective of how the conduct should be viewed by the Board. He stated:

13. *As the Board will well know, there is a very wide range of buildings which require Building Consents under the Act. For some simple buildings, a builder will be able to prepare the plans to a sufficient standard to obtain a Building Consent. Residential buildings almost always require the involvement of a professional draughtsperson. These persons range from draughtspersons who limit their work to simple plans through to registered Architects and Engineers who do complex plans. Most of my business falls in the area where people require designs and plans and specifications for their private homes. These private homes range from simple homes through to complex challenging buildings where other professionals such as engineers have to be involved.*

[33] The Respondent, in his Statement, set out his personal and professional background and events that impacted his performance at the relevant time. He also provided detail on his business operations, stating:

16. *I believe and most of my clients believe, that I give good value for what I produce. The volume of work that comes to me indicates that there is a place in the market where I fit and where I am appreciated. I*

try to give good design and try to produce modern attractive buildings without loading clients with substantial fees.

17. *My business structure comprises myself and two draughtspersons. I accept that I am responsible for all of the work that comes out of my business although some of the work is undertaken by employees. I accept that it is my obligation to supervise my employees such that the finished work is of an acceptable standard.*
18. *As will be seen from the volume of work which my business produces, I am required to work long hours and to work quickly.*
19. *I accept that mistakes have been made for which I am responsible. Most of the mistakes are mine but some of them are mistakes by employees which I have not picked up.*
20. *I believe that the standards in my practice have improved and are constantly improving and that I am putting out good quality work.*

[34] With respect to the Respondent's personal circumstances at the time, he stated:

33. *The matters in the Special Advisor's Report cover a period when I was under personal pressure coupled with the business pressure of having a lot of work to do and, on reflection, insufficient resources. At this time I had unqualified staff who were working beyond their levels of experience and I was not training and supervising them adequately.*
34. *Currently I have two employees whom I regard as being capable and they are being closely supervised. In addition I have engaged Paul Harrison a very experienced Consents Officer to review the work we do in areas where I think reviews would be helpful.*

[35] The Respondent concluded his Statement saying:

39. *I have learnt from this experience. The things I have learnt include the following:*
 - (a) *That I need to give more attention to detail and remove inconsistencies from plans.*
 - (b) *I need to have as well qualified and experienced staff as I can obtain and I need to supervise them closely.*
 - (c) *I need to recognise that the design work that I do is required to be carefully done and that this takes time and cost.*
40. *In an overall sense I have learnt that there is a relationship between the time required to do work properly and the cost of doing that work.*

41. *Most of all I have learnt that in times of stress professional standards have to be maintained and that may mean doing less work and engaging better qualified people to help.*
42. *I believe that currently my business is in good order with good staff resources and outside help being available. I have many projects underway and clients are dependent upon me to get them finished. My staff are depending on me to keep my business going and maintain their employment positions.*

[36] At the hearing, the Respondent spoke to his Statement of Evidence and the improvements he has made to his business practices and systems, including staffing changes, the introduction of check sheets and the use of an external consultant on complex designs. He noted that he had paid the additional consenting costs associated with the building consents under investigation out of his own pocket.

[37] The Respondent also stated that he has learnt to better manage client expectations and to turn work down when he does not have the capacity, or the design work falls outside of his personal limits or competence.

Board's Conclusion and Reasoning

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

[39] The Board accepted that the Respondent had not been incompetent but that he had been negligent. 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*,¹¹ it was stated as “*an inability to do the job*”. The Board found that the Respondent had the ability, skill and knowledge but that his design work and his supervision of design work in relation to the building consents under investigation did not meet acceptable standards, which is the test for negligence.

[40] Negligence is judged against those of the same class of licence as the person whose conduct is being inquired into, in this case, a licensed building practitioner with a design license. This is described as the *Bolam*¹² test of negligence which has been adopted by the New Zealand Courts¹³.

[41] Counsel for the Respondent submitted that the Respondent should not be judged against engineers and registered architects. The Board agrees. It has considered the Respondent's conduct in light of that to be expected of Licensed Building Practitioners and, in particular, those with a Design Area of Practice (AoP) 2 licence.

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

A Design AoP 2 licence holder can design Category 1 and 2 Buildings. That said, the licensing regime exists to ensure minimum standards are met. Those minimum standards apply regardless of the type of licence, registration or qualification of the holder, and, in this instance, those minimum standards were not met.

- [42] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹⁴. 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.
- [43] 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 Act¹⁵. 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 practitioner¹⁶.
- [44] 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.*

- [45] The Board also notes the provisions of section 14D of the Act, which states:

14D Responsibilities of designer

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁵ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁶ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[46] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account.

[47] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁷ 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.

[48] Looking at the Respondent's design work, there was clear evidence in Mr Pynenburg's report that it had been carried out in a substandard manner. The Respondent accepted that this was the case, although he did submit that it ought to have been clear to those using his designs that, in the event of inconsistency between his designs and the engineers, the engineer's designs took precedence.

[49] The Board did not accept that submission. The Respondent was the lead person as regards the design. He submitted the Certificate of Work required under section 45(3) of the Act. It was his responsibility to ensure consistency between the design documentation he produced and obtained from others. Consistency is important, and there is no guarantee that those using the designs will necessarily identify the inconsistencies. Moreover, inconsistencies can lead to increased costs as those carrying out the build should, when confronted with inconsistencies, stop work and seek clarification.

[50] The Board also has reservations about the submissions made with regard to design quality versus costs. Whilst the Board accepts that lower-cost design work serves a useful economic function, it should not be at the cost of quality. Quality and compliance should be at the forefront of design work, and failings in those areas can be counterproductive from an economics perspective. Failings in quality can lead to rework or on-site issues. Practitioners should be aiming to get the work right the first time, and they should not be relying on others, including the building consent authority, to identify their errors.

¹⁷ [2001] NZAR 74

- [51] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁸:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [52] The Board notes that many of the substandard design issues arose as a result of the Respondent's failure to provide adequate or appropriate levels of supervision of others. Supervise is defined in section 7¹⁹ 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.*

- [53] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances but that ultimately the Board needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

¹⁸ Hansard volume 669: Page 16053

¹⁹ 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.*

- [54] 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 1992²⁰. 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, in 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 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.”

- [55] The Respondent accepted, and it was clear to the Board that the Respondent’s level of supervision also failed to meet an acceptable standard. His quality assurance processes were lacking. He did not identify and rectify design errors made by those who worked for him.
- [56] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Penalty, Costs and Publication

- [57] 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.
- [58] The Respondent made submissions at the hearing as regards penalty, costs and publication. The Board proceeded to make a decision.

Penalty

- [59] 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*²¹ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times,

²⁰ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

²¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

[60] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*²² the High Court, in relation to the principles relating to penalties, stated:

[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.

[61] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²³ 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.

[62] Counsel for the Respondent submitted that a fine was the appropriate form of sanction. His written submissions stated:

25. *In these circumstances a fine should be imposed and the Respondent should be positively encouraged to continue to improve standards and continue to provide his services to the communities he serves*

23. *If it is accepted that the penalty is to be a fine then the quantum of that fine will be for the Board to determine but the following need to be taken into account:*

[63] In terms of quantum, Counsel's submissions noted the following:

(a) *This is the first complaint against the Respondent.*

²² [2011] 3 NZLR 850

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

- (b) *The complaint has not come from a consumer but from a Regulatory Body.*
- (c) *There is an explanation for the failures during this period.*
- (d) *The Respondent has taken strong steps to correct his performance.*
- (e) *The Respondent gives valued services to the communities of Tasman, Nelson and Marlborough.*
- (f) *This has been a worrying and costly time for the Respondent. The complaint was first made in February 2020. The Registrar's Report was received in December 2020. The Special Advisor's Report has been received in June 2021. So it has been an extended and worrying process for the Respondent.*
- (g) *The Respondent has personally met all of the costs which have accrued from refusals.*

- [64] At the hearing, Counsel submitted that a starting point of \$5,000 was appropriate.
- [65] The Board adopted a higher starting point of a fine of \$7,500. The failings were significant, and it was disconcerting that the Respondent, as a design professional, was not able to identify with them until such time as the Special Adviser laid them out for him. The number of building consents to which the conduct related is an aggravating factor. Countering this are the mitigating factors outlined by Counsel. The Board accepts all, bar the submission that the complaint was made by a regulatory body, as mitigating factors. It does not accept that the complaint was made by a regulatory body as a mitigating factor as regulatory bodies have a key role to play in the quality and compliance framework and the Board would expect them to make complaints where appropriate.
- [66] Taking the accepted mitigating factors into account and also taking into account the Respondent's acceptance of responsibility at the second hearing, the Board arrived at a final penalty of \$5,000.
- [67] The Respondent should note that, if it were not for his change of stance toward his failings to an acceptance that his conduct had fallen below an acceptable standard, the Board would have considered a more stringent penalty, which may have involved suspension or cancellation. The fact the Respondent is now taking responsibility and has taken positive steps toward addressing the issues noted in the Special Advisers report meant that the Board did not have to consider suspension or cancellation.
- [68] The Board also recommends that the Respondent studies and makes use of the Special Advisers report. There is valuable learning to be gained from it.

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 case²⁴.
- [71] In *Collie v Nursing Council of New Zealand*,²⁵ 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*,²⁶ 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.*
- [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 complex. Adjustments based on the High Court decisions above are then made.
- [74] There have been two hearings. The second was necessitated by the Respondent's approach at the first hearing. The Respondent adopted a different approach at the second hearing, which reduced the time required to deal with the matter. A Special Adviser was appointed. Whilst it was at the direction of the Board, it was not until the Respondent faced with the Special Adviser's summary of findings that he accepted that his conduct had fallen below an acceptable standard. The cost of the Special Adviser needs to be taken into consideration²⁷.

²⁴ *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.

²⁵ [2001] NZAR 74

²⁶ CIV-2011-485-000227 8 August 2011

²⁷ The Special Advisers report cost \$24,000. The amount excludes his appearance at the hearing.

[75] The Board's scale for a half-day hearing for a complex matter is \$5,500 without a Special Adviser and \$8,000 with one. There have been two half days of hearings, one with a Special Adviser, one without. Notwithstanding this and the actual costs incurred, the Board has decided that the amount of \$8,000 is a fair and appropriate amount to order the Respondent to pay toward the costs of and incidental to the Board's inquiry.

Publication

[76] 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 Act²⁸. 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.

[77] 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.

[78] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³¹. 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*³².

[79] 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 interest³³. 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.

[80] Counsel submitted that further publication was not necessary and that it would be disproportionality damaging to the Respondent.

²⁸ Refer sections 298, 299 and 301 of the Act

²⁹ Section 14 of the Act

³⁰ Refer sections 200 and 202 of the Criminal Procedure Act

³¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³² *ibid*

³³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[81] The Board has decided that whilst it would ordinarily be in the public interest to further publish the matter, the particular circumstances of this matter do not warrant further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$5,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$8,000 (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.

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

[84] The Respondent can seek to pay the fine and costs off over time.

Right of Appeal

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

Signed and dated this 3rd day of September 2021.



Mr C 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:*

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- (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.*