

## Before the Building Practitioners Board

	BPB Complaint No. CB25158
Licensed Building Practitioner:	Shubhendu Banerjee (the Respondent)
Licence Number:	BP107142
Licence(s) Held:	Design 2

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	On the Papers
Hearing and Decision Date:	24 June 2020

#### Board Members Present:

Chris Preston, Chair (Presiding)  
Mel Orange, Deputy Chair, Legal Member  
David Fabish, LBP, Carpentry and Site AOP 2  
Faye Pearson-Green, LBP, Design AOP 2

#### Counsel:

Hugh King, Wooton + Kearney (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 a disciplinary offence under section 317(1)(b) of the Act.

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## Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at *[Omitted]*. The alleged disciplinary offences the Board resolved to investigate were that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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 public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [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*<sup>4</sup> Collins J. noted that:

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

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

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

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

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

*... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

- [5] 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.
- [6] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [7] 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.
- [8] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Background to the Complaint**

- [9] The matter was set down for a hearing before the Board with witnesses in attendance. Prior to the hearing, the Respondent’s legal counsel wrote to the Board asking that the Board deal with the matter on the papers and that he be given an

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

opportunity to make a submission on penalty, costs and publication. The Board vacated the in-person hearing and dealt with the matter on the papers.

[10] The letter from the Respondent's legal counsel accepted that he had been negligent. It stated:

2. *In his response to the complaint dated 16 May 2019 (his response), Mr Banerjee acknowledged that he did not verify his assumptions with regards to the concealed roof structure (and in particular, the parapet detailing) with reference to drawings for the existing house which he possessed. He also acknowledged that his roof design required amendment because his assumptions about the concealed existing parapet detailing, on which the design was based, turned out to be incorrect.*
3. *Having had further time to reflect on what occurred and to avoid the costs and expenses associated with a full hearing, Mr Banerjee now concedes that by not checking the drawings to verify his assumptions, his pre-design investigations to confirm the existing roof structure were carried out in a negligent manner for the purpose of s317(1)(b) of the Act (his admission).*

[11] The Board proceeded on the basis that the Respondent had accepted that he had been negligent.

### **Evidence**

[12] The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. As the Respondent had accepted that he had been negligent, the Board did not consider it was necessary to call any further evidence or to test the evidence before it.

[13] The Respondent submitted the following additional evidence for the Board's consideration:

- (a) *at the start of the design process, Mr Banerjee proposed removal of the existing roof and the addition of a new roof; the decision to retain the existing roof was only taken out of a desire to fulfil the wishes of his client, [Omitted], who was concerned about cost;*
- (b) *the roof design (that required amendment) was not done without any consideration of the existing structure: although he omitted to refer to the drawings of the existing house, Mr Banerjee had attended site and made assumptions as to the likely detailing of the parapet based on his inspection; and*
- (c) *when the parapet detailing was revealed during construction and it became apparent the roof design would require amendment, Mr Banerjee liaised with the builder and truss manufacturer and prepared*

*the drawings for the redesigned truss roof that went to the Auckland Council for amended consent. Mr Banerjee did not charge [Omitted] for this additional work.*

- 6.3 *Mr Banerjee has taken steps to improve his practice and ensure that the error that occurred in this case does not recur in future:*
- (a) *in particular, he has implemented regular staff training and introduced quality control checklists which are rigorously overseen by his practice manager; and*
  - (b) *he has invested in better CAD software to improve the documentation issued from his practice.*

[14] The Respondent also submitted that he had an excellent record as a designer and he noted a history of satisfied clients which he supported with testimonials.

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

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

[16] 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, in this case a licensed building practitioner with a design license. This is described as the *Bolam*<sup>6</sup> test of negligence which has been adopted by the New Zealand Courts<sup>7</sup>.

[17] The Board reached its decision on the basis of the Respondent's acceptance of responsibility.

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

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

[19] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

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<sup>6</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>7</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

## Penalty

[20] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>8</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

[21] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>9</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[22] The Board adopted a starting point of a fine of \$3,500. The amount is consistent with fines imposed for similar matters that have come before the Board.

[23] The Board reduced the fine to \$2,000 on the basis that the Respondent accepted responsibility prior to the matter going to a hearing. A further reduction of \$500 was made in recognition of the mitigating factors noted by the Respondent. The fine is set at \$1,500.

## Costs

[24] 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.”

[25] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>10</sup>.

[26] In *Collie v Nursing Council of New Zealand*<sup>11</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

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

<sup>8</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>9</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>10</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>11</sup> [2001] NZAR 74

- [27] The Board's scale costs for a half-day hearing is \$3,500. The matter was dealt with on the papers. The costs have been less than those that would have been incurred had an in-person hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

### Publication

- [28] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act<sup>12</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

*In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

- [29] 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.
- [30] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>13</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>14</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>15</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>16</sup>.
- [31] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>17</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [32] Based on the above, the Board will order further publication by way of an article in Code Words about the risks, when carrying out design work on alterations and extensions, of relying on assumptions and the additional competencies required for such work. The Respondent will not be named in the publication.

<sup>12</sup> Refer sections 298, 299 and 301 of the Act

<sup>13</sup> Section 14 of the Act

<sup>14</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>15</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>16</sup> *ibid*

<sup>17</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

### Section 318 Order

[33] 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 \$1,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

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

[34] 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

[35] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **7 August 2020**. 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.

[36] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

## Right of Appeal

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

Signed and dated this 17<sup>th</sup> day of July 2020



**Chris Preston**  
Presiding Member

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### <sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (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."*

### <sup>ii</sup> **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.*