

## Before the Building Practitioners Board

	BPB Complaint No. CB25647
Licensed Building Practitioner:	Geoffrey Barton (the Respondent)
Licence Number:	BP 135534
Licence(s) Held:	Carpentry

---

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

---

Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing and Decision Date:	9 June 2021

#### Board Members Present:

Mr M Orange, Deputy Chair, Legal Member (Presiding)  
Mr B Monteith, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2

#### Procedure:

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

#### Disciplinary Finding:

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

## Contents

<b>Summary of the Board’s Decision</b> .....	2
<b>The Charges</b> .....	2
<b>Function of Disciplinary Action</b> .....	3
<b>Inquiry Process</b> .....	4
<b>Evidence</b> .....	4
<b>Board’s Conclusion and Reasoning</b> .....	7
Negligence – Carrying out Building Work without a Building Consent.....	7
Outside of Competence .....	12
<b>Penalty, Costs and Publication</b> .....	14
Penalty .....	14
Costs.....	15
Publication .....	16
<b>Section 318 Order</b> .....	17
<b>Right of Appeal</b> .....	17

## Summary of the Board’s Decision

[1] The Respondent was negligent when he failed to ensure that a building consent was in place for the construction of a wet area tiled shower prior to the building work being undertaken. The Respondent carried out building work outside of his competence when he carried out electrical and plumbing work. He has committed disciplinary offences under section 317(1)(b) and 317(1)(h) of the Act. His licence is cancelled for a period of three months. He is ordered to pay costs of \$1,500.

## The Charges

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

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, he may have carried out building work that required a building consent without first ensuring one was in place. In further investigating this matter, the Board will consider whether a building consent was required for the construction of a wet area shower, the repositioning of plumbing fixtures,

---

<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.

and/or the removal of a wall to a second bedroom, all of which may have required a building consent; and

- (b) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have carried out plumbing and or electrical work when he was not authorised to do so.

### Function of Disciplinary Action

[3] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

[4] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,<sup>4</sup> Collins J. noted that:

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

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

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

[6] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

---

<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

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

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

### **Inquiry Process**

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

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [11] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- |                 |   |
|-----------------|---|
| Geoffrey Barton | Respondent  |
| [Omitted]       | Complainant   |
| [Omitted]       | Electrician (E[Omitted]), [Omitted]                     |
| [Omitted]       | Licensed Building Practitioner, Carpentry (BP[Omitted]) |
| [Omitted]       | Electrician (E[Omitted]), employee of [Omitted]         |
- [13] The Complainants engaged the Respondent to carry out alterations to the ground floor of a two-story residential dwelling. The dwelling, which was owned by the

---

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

Complainants' daughter, was split into two dwellings. The ground floor was occupied by the Complainants'. The first floor by the owners.

- [14] The alterations included the amalgamation of a laundry and a bathroom into a single larger bathroom with a new wet area shower, the conversion of the garage into a bedroom, the removal of a bedroom wall to make a larger room and the movement of a kitchen wall.
- [15] The Respondent gave evidence that the alteration required the removal of walls and the creation of new internal framing. He stated framing removed was not structural and that it did not contain bracing elements. He referred to the size of the framing used in the walls removed versus the structural framing (70mm versus 90mm), to the direction of the framing removed, which was parallel to the first floor joists, and to the solid fill exterior concrete block walls. He also stated the new framing installed was not structural. Mr [Omitted], who completed the building work, agreed that it was not structural.
- [16] The laundry and bathroom amalgamation involved the removal of an existing fibreglass shower cubicle, the creation of a wet area tiled shower, and the relocation of a vanity and toilet. The Respondent carried out the sanitary plumbing work. It included the extension of the hot and cold water plumbing to the new shower by approximately 200mm, the extension of the waste pipe for the shower by approximately 200mm, and the installation of a new shower mixer. The pipes for the vanity were moved by approximately 300mm-400mm, and an elbow was installed. A disused waste pipe in the bathroom was blocked off. A new toilet was installed. The Respondent stated it was installed on a temporary basis. Kitchen plumbing was also moved. A plumber was not engaged. The Respondent was not working under the supervision of an authorised person. Following completion of the Respondent's plumbing work, the Complainants engaged a plumber to deal with a leak.
- [17] The Respondent, when asked about why he carried out the plumbing work himself, responded that he thought he could do it on the basis of a home owner exemption but accepted that he was not the home owner.
- [18] The Respondent described how he created the tiled shower, including the materials used and the method of tanking. He was not able to refer to any documentation that he used to meet building code requirements or what the building code requirements were for a wet area tiled shower or for ventilation and lighting requirements for a bathroom. He stated that no mechanical ventilation was installed and that the only ventilation was an existing bathroom window. The Respondent stated that he did not make any inquiries as to whether a building consent was required for the work. He was unaware of Schedule 1 Building Act exemptions or of any guidance documentation for building consent exemptions.
- [19] The Respondent also carried out electrical work as part of the renovations. The Respondent, in his written response to the complaint dated 16 November 2020, stated:

6. *Electrical - bedroom 2 - I replaced 3 x flush boxes, fitted 1 x mounting box and 1 x neat cap. Replace damaged light switch.*
7. *Kitchen - replaced 1 x light switch that I damaged during demolition. Fitted 4 x double power points, 4 x flush boxes, 1.5mm twin and earth cable.*
8. *Bathroom - replaced 1 x light switch, replaced 1 x power outlet and 2 x flush boxes.*
9. *Hallway- replaced 1 x damaged light switch.*

*NB - All points were checked by [Omitted] and found to have no faults.*

*I have not and did not put any new lights in or change any power source to the same or add any light circuits despite [Omitted] claim, these were obviously already like it.*

[20] An electrician, [Omitted], was engaged by the Complainant's to check the electrical work. He provided an inspection report, which stated:

*- Builder has completed his own electrical work updating power points. Please check that they have been completed correctly and that they are under RCD or RCBO protection.*

*Scope all works installed by builder. Remove and inspect all power points.*

*No faults found on power circuits that were visible on inspections. Note – the walls have been lined and we were unable to check the cable runs or conditions.*

*-Inspect light circuits tampered with by builder,*

*Found to be switching active feeds and livened neutrals. Not compliant to AS/NAS3000:3007.*

*Also found power socket outlet cable fed by lighting circuit. Not compliant to AS/NAS3000:3007.*

*None of the above work was protected by RCD or RCBO as stated under the current regulations: Any alteration or addition to any existing circuit, needs to be protected by a residual current device and fused to protect against short circuit protection.*

[21] Mr [Omitted] stated that the Respondent was not working under his supervision.

[22] At the hearing, the Respondent accepted that he had carried out the electrical work. When asked why he considered he could carry out prescribed electrical work, he referred to a home-owner exemption. He accepted he was not the home-owner. He stated he could have had an electrician look over the work.

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

[23] 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) breached section 314B(b) of the Act (s 317(1)(h) of the Act);
- and **should** be disciplined.

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

#### Negligence – Carrying out Building Work without a Building Consent

[25] The Board's considerations in relation to negligence and incompetence relate to the failure to ensure a building consent was in place prior to the building work being undertaken.

[26] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).

[27] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

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

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

[28] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

**49 Grant of building consent**

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[29] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and

that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3:

### **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.*

[30] In *Tan v Auckland Council*<sup>7</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

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

[32] Justice Brewer in *Tan* also noted:

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

[33] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal,

---

<sup>7</sup> [2015] NZHC 3299 [18 December 2015]



however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

- [34] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.
- [35] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [36] The Board accepted that the building work the Respondent carried out to create a bedroom did not require a building consent as it came within clauses 10, 11 and 12 of Schedule 1 of the Building Act, which provide:

**10 Interior alterations to existing non-residential building**

*Building work in connection with the interior of any existing non-residential building (for example, a shop, office, library, factory, warehouse, church, or school) if the building work—*

- (a) *does not modify or affect the primary structure of the building; and*
- (b) *does not modify or affect any specified system; and*
- (c) *does not relate to a wall that is—*
  - (i) *a fire separation wall (also known as a firewall); or*
  - (ii) *made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar; and*
- (d) *does not include sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.*

**11 Internal walls and doorways in existing building**

*Building work in connection with an internal wall (including an internal doorway) in any existing building unless the wall is—*

- (a) *load-bearing; or*
- (b) *a bracing element; or*
- (c) *a fire separation wall (also known as a firewall); or*

- (d) *part of a specified system; or*
- (e) *made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar.*

**12 Internal linings and finishes in existing dwelling**

*Building work in connection with any internal linings or finishes of any wall, ceiling, or floor of an existing dwelling.*

- [37] The building work that, on the evidence that was before the Board, did require a building consent was the creation of a wet area tiled shower. The guidance documentation issued in relation to Schedule 1 of the Building Act<sup>8</sup> clearly states the exemptions in Schedule 1 do not apply to wet area showers. It defines a wet area shower as:

***Wet area shower***

*A shower with a floor that is a continuation of the bathroom floor rather than a separate raised shower tray or cubicle. Also known as a level entry shower.*

- [38] The Guidance documentation states:

*Installing a tiled wet area shower in an existing dwelling will require a building consent. This is because the construction of a wet area shower generally includes critical building work, such as waterproof membranes and structural modifications to the flooring system.*

- [39] As the Schedule 1 exemption does not apply to the creation of a wet area shower, which is what was built by the Respondent, a building consent should have been obtained prior to the work being carried out. The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so, whether the Respondent has, as a result of the failing, been negligent.

- [40] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>9</sup> 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.*

- [41] 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

---

<sup>8</sup> Guidance information can be issued under section 175 of the Act.

<sup>9</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*<sup>10</sup> test of negligence which has been adopted by the New Zealand Courts<sup>11</sup>.

- [42] 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*<sup>12</sup> it was stated as “*an inability to do the job*”.
- [43] The New Zealand Courts have stated that an assessment of negligence or incompetence in a disciplinary context is a two-stage test<sup>13</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [44] 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 purposes of the Act<sup>14</sup> which are outlined above. The test is an objective one and, in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>15</sup>.
- [45] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>16</sup>, the Court’s noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

- [46] Looking at the building work, there was a clear requirement for a building consent for the creation of a wet area shower. The Respondent, as a Licensed Building Practitioner, should have been aware of that requirement. One of the key competencies for a Licensed Building Practitioner, is the requirement to understand and apply the regulatory requirements. Fundamental in that is an understanding of building consent requirements. The Respondent, however, did not display that

---

<sup>10</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>12</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

<sup>14</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>15</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>16</sup> [2001] NZAR 74

knowledge. Nor did he make any enquiries about the need for a building consent. He did not turn his mind to it. He based his decision on an assumption that was wrong.

- [47] 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, that he has failed to show the required regulatory knowledge, and that the conduct in respect of both failings was sufficiently serious enough to warrant a disciplinary outcome.

### Outside of Competence

- [48] Section 314B(b) of the Act provides:

*A licensed building practitioner must—*

*(b) carry out or supervise building work only within his or her competence.*

- [49] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. If a licensed building practitioner undertakes work outside of their licence class,<sup>17</sup> then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience, especially if the building work is noncompliant or is in some way deficient. The same applies if they work outside of their trade.

- [50] In this instance, the Respondent carried out both sanitary plumbing work and prescribed electrical work. Both types of work require specific authorisations. Section 8 of the Plumbers, Gasfitters, and Drainlayers Act 2006 states:

**8      *Restrictions on doing or assisting with sanitary plumbing***

- (1) *A person must not do any sanitary plumbing, or assist in doing any sanitary plumbing, unless that person is authorised to do so under this section.*
- (2) *The following persons may do sanitary plumbing, or assist in doing sanitary plumbing, within the limits prescribed in regulations (if any):*
- (a) *a registered person who is authorised to do, or assist in doing, the work under a current practising licence; or*
- (b) *a person who is authorised to do, or assist in doing, the work under a provisional licence.*

---

<sup>17</sup> Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

(3) *A person does not do any sanitary plumbing, or assist in doing any sanitary plumbing, in breach of this section if that work is done in accordance with sections 12 to 27.*

(4) *Subsection (1) is subject to subsection (3) and sections 11 to 27.*

[51] The Respondent was not able to point to any of the exceptions within the Plumbers, Gasfitters, and Drainlayers Act 2006 that might have applied to him.

[52] Section 74 of the Electricity Act 1992 states:

**74 Restrictions on doing or assisting with prescribed electrical work**

(1) *A person must not do any prescribed electrical work, or assist in doing any prescribed electrical work, unless that person is authorised to do so under this section.*

(2) *The following persons may do prescribed electrical work, or assist in doing prescribed electrical work, within the limits prescribed in regulations (if any):*

(a) *a registered person who is authorised to do, or assist in doing, the work under a current practising licence:*

(b) *a person who is authorised to do, or assist in doing, the work under a provisional licence:*

(c) *a person who is authorised to do, or assist in doing, the work under an employer licence.*

(3) *A person does not do any prescribed electrical work, or assist in doing any prescribed electrical work, in breach of this section if that work is done in accordance with any of sections 75 to 80.*

(4) *A body corporate that is responsible for any prescribed electrical work does not do any prescribed electrical work, or assist in doing any prescribed electrical work, in breach of this section if the natural person or natural persons who actually do, or assist in doing, that work are authorised to do so under this Act.*

(5) *Subsection (1) is subject to subsections (3) and (4) and sections 75 to 81.*

(6) *For the purposes of this Part and Part 10, regulations means regulations made under section 169.*

[53] Again, the Respondent could not point to any applicable exception within the Electricity Act.

- [54] Both Acts have a home-owner exemption<sup>18</sup>. Those exemptions, however, only apply to a person who is an owner and who is, or intends to be, in occupation. The Respondent submitted that he might have been working under those provisions. He was not.
- [55] It should also be noted that it is an offence under each of the Acts<sup>19</sup> for persons to carry out sanitary plumbing or prescribed electrical work in breach of the Acts and that significant fines can be imposed by the District Court. This shows how seriously the matters are taken. Getting either wrong can have serious impacts on the health and safety of occupants.
- [56] Based on the above, the Board finds that the Respondent did carry out building work that he was not competent to carry out. In this respect, it is to be noted that the definition of building work in the Building Act is sufficiently wide enough to include both sanitary plumbing and prescribed electrical work.

### **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 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.
- [58] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### **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*<sup>20</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

- [60] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>21</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a

---

<sup>18</sup> Section 15 of the Plumbers, Gasfitters, and Drainlayers Act 2006 and section 79 of the Electricity Act 1992

<sup>19</sup> Section 123 of the Plumbers, Gasfitters, and Drainlayers Act 2006 and section 162 of the Electricity Act 1992

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

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

starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [61] The Respondent gave evidence that he was currently out of work and that he and his wife were relying on social welfare as a result of a medical condition. That condition was preventing him from working as a builder and that it would continue to do so for some time. He also noted that there is a disputes tribunal claim against him for the work for \$5,000.
- [62] The offending was serious. It involved a lack of understanding as to the regulatory environment. In this respect, the licensing regime is predicated on licensed building practitioners having the requisite skill and knowledge to ensure building work is carried out in a compliant manner. The path to becoming licensed involves an assessment of those qualities.
- [63] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.
- [64] Taking the above factors into account, the Board considers that a cancellation of the Respondent's licence is warranted to not only punish the Respondent but also to deter others from such conduct. Cancellation will also ensure that the Respondent's competence is revaluated under the Licensed Building Practitioners Rules 2007 if and when he seeks to obtain a new licence.
- [65] The Respondent's licence will be cancelled for a period of three months.

#### Costs

- [66] 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."
- [67] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>22</sup>.
- [68] In *Collie v Nursing Council of New Zealand*,<sup>23</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

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

---

<sup>22</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

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

[69] The Board noted the Respondent's constrained financial circumstances, and it has taken that into account. The Board's normal starting point for costs in a hearing of this nature is \$3,500. However, given the Respondent's financial situation and the fact that the hearing was straightforward and that cancellation is a significant penalty, the Board's costs order is that the Respondent is to pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry.

#### Publication

[70] 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>24</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.*

[71] 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.

[72] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>25</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>26</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>27</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>28</sup>.

[73] 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>29</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.

[74] Based on the above, the Board will not order further publication.

---

<sup>24</sup> Refer sections 298, 299 and 301 of the Act

<sup>25</sup> Section 14 of the Act

<sup>26</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>27</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>28</sup> *ibid*

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



## Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three [3] months.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (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.

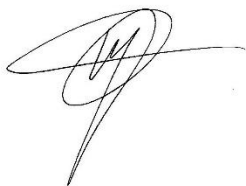
In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

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

## Right of Appeal

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

Signed and dated this 17<sup>th</sup> day of June 2021



**Mr M Orange**  
Presiding Member

---

### <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."*

**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.*