Before the Building Practitioners Board

	BPB Complaint No. CB25174
Licensed Building Practitioner:	Henry Rogo (the Respondent)
Licence Number:	BP 101184
Licence(s) Held:	Carpentry and Site AOP 1

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	Wellington
Hearing Type:	In Person
Hearing Date:	19 November 2019
Decision Date:	18 December 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry and Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Robin Dunlop, Retired Professional Engineer

Procedure:

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

Board Decision:

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

Contents

Introduction

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

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

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

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

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

the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

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

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

[4] 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[5]:

> *… 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 are important to note in this case as the Board received a high volume of evidence and the complaint raised a number of allegations that did not meet the seriousness threshold. As such the Board's inquiries, and this decision, focused 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

[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

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 Hearing

[9] The matter was set down to be heard on 11 September 2019. The Respondent sought and was granted an adjournment on the basis that the Respondent needed to instruct new legal counsel that had only recently taken over from prior counsel that had been instructed. A new hearing date of 23 October 2019 was set.

[10] On 23 October 2019 the hearing proceeded as scheduled with witnesses in attendance. The Respondent appeared with *[Omitted]* whom he described as his industry representative and not with legal counsel. The Respondent advised that the day prior to the hearing he had decided not to attend with legal counsel. He sought a further adjournment so that *[Omitted]* could prepare to assist him. A further adjournment was granted.

[11] Costs were reserved for both adjournments.

Respondent's Submissions on the Validity of the Complaint

[12] The Respondent's Representative, who had past working experience with building consent authorities, made submissions at the commencement of the hearing protesting the validly of the complaint. In summary his submission was that the complaint was in breach of the Council's code of ethics; that Council's should not make complaints about licensed building practitioners; that the Council employee who had made the complaint had no authority to do so; and that the complaint had been made in bad faith and was vexatious.

[13] The Complainant was asked by the Representative if he had been authorised by the Council to make the complaint. The Complainant stated that he had raised it with his direct manager who had given him express permission to make the complaint.

[14] He submitted that the appropriate course of action, and that which should have been followed, was to allow the Notice to Fix process to take its course and to allow the matters to be resolved as part of the building consent authority's processes.

[15] Neither the Respondent nor his Representative provided any evidence or authorities to substantiate the submission notwithstanding that they were asked by the Board to do so.

[16] The Board found that the complaint was valid and that it had not been made in bad faith, was not vexatious or otherwise an abuse of process.

[17] With regard to validity section 315 of the Act states that any person may make a complaint. In other words, there are no restrictions on who can make a complaint.

[18] In terms of a council or council employee making a complaint the Board sees the Council as having a positive duty to ensure that the licensing regime is operating as intended and that expected standards are upheld. Councils, when fulfilling the role of a building consent authority, are at the heart of the compliance regime and are often best placed to see and complaint about the conduct of licensed building practitioners. It is more than appropriate that they bring concerns to the Board's attention.

[19] In terms of an abuse of process the Complaints Regulations allow the Board to determine, at the point in time when it decides if a complaint should proceed to a hearing, if a complaint is frivolous, vexatious, or not made in good faith[6]. Frivolous complaints are those that do not have any serious purpose or value. Vexatious are those which are improperly motivated such as where they lack merit or are instituted primarily to distress, annoy or embarrass rather than to obtain the remedy sought. Complaints that are not made in good faith are those which lack honesty or sincerity.

[20] There may, in any complaint made about a licensed building practitioner, be elements of the above matters or of them having those effects. Of itself that is not, however, to make a complaint frivolous, vexatious, or not made in good faith. A complaint needs to have been made predominately for those purposes and to lack value or merit. This is not the case with the matters before the Board.

Evidence

[21] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[7]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

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

Henry Rogo	Respondent
[Omitted]	*[Omitted]*
[Omitted]	*[Omitted]*

[23] The Respondent was engaged to complete a new residential build. The work started in early December 2017. As at the date of the hearing the project is still not complete. It has only progressed to the stage where cladding is being erected. The issues which lead to the complaint resulted in the delays in the building work.

[24] The Board focused on the issues contained in a Notice to Fix issued by the *[Omitted]* on 26 September 2018. The Notice to Fix noted:

[6] Refer regulation 9 of the Complaints Regulations
[7] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

(a) a failed inspection on 8 May 2018 which noted:

> *Lower level timber frames appear to be weathered with fixings rusted, confirmation required in regards to timber treatment levels and the suitability and durability of framing fixings.*
>
> *Fixings of steel portal at rear of building have blown out concrete, engineer to conduct site evaluation and Provide remedial work solution.*

(b) a failed pre-wrap inspection on 19 June 2018. The inspection was failed due to the issues previously not being addressed;

(c) a pre-wrap inspection on 13 September 2018 at which it was noted that the issues previously raised had not been addressed and that the building had been wrapped with roofing iron installed, soffits completed and some internal lining complete without an approved pre-wrap inspection. Further noncompliance issues were noted as:

- *Stud to top-plate connections do not appear to have been installed Trusses cut/ modified in some areas*
- *Roof plane brace not tensioned*
- *Roofing paper not achieving minimum upstand Substrate non-compliant*
- *Incorrect screws to window support bars Unsupported deck at rear.*
- *Dangerous unsupported patio roof Unsupported front entrance roof Non-compliant building paper*
- *The structural engineer's site report was onsite at the time of the inspection. The comments from that site report indicate that the structural bolts and beams have also not been constructed in accordance with the engineers design.*

(d) a site inspection on 24 September 2018 where the following additional noncompliance items were identified:

- *Bottom plate fixings inadequately spaced and bolts have insufficient concrete cover to the external edge of the foundation*
- *Bottom plate bolts also have large amounts of thread exposed, the nuts are loose and the bolts are easily moved indicating oversized holes*
- *Bottom plate bolts used for bracing units are the incorrect type and do not comply with manufacturers specifications*
- *Structural bolt connections to beams are visibly loose and a number have oversized washers*
- *Unsupported butt joints were identified to several ribbon beams*
- *Lintel sizes differ from that consented throughout the dwelling.*
- *The Hyspan boundary joist over the northern elevation opening has oversized notching over point load.*
- *The fixings to the steel portal leg have blown out the corner of the concrete foundation*

- *Noncompliant gauge of lintel straps with insufficient fixings to those straps*
- *Poorly fitted and secured roof bracing straps with roof plane bracing missing from southern elevation*
- *No safety glass to bathroom window*
- *Trusses have been cut and modified in the dining room.*
- *Truss fixings incorrectly fitted and otherwise in accordance with truss layout*
- *Trusses in study are completely unsupported*
- *Rafters and jack framing over the garage not adequately bearing on supporting framing*
- *Truss installation is outside the scope of allowable tolerances for deviation from the vertical, a girder truss was observed to be approximately 50mm out of plumb*
- *Unsupported joints in sheet flooring material*
- *Purlin layout incorrect for flashing support and fixings. Ceiling batons have been retrospectively used as purlins to support and provide fixing to an apron flashing in one instance*
- *Deck substrate non-compliant with approved plan, have been incorrectly secured and minimum falls have not been achieved*
- *Cavity battens have incorrect fixings with corrosion already evident otherwise in accordance with manufacturers specifications*
- *Stud/top-plate connections not in place*
- *Interior layout differs from consent*
- *Building paper and flashing tapes incorrectly fitted and noncompliant with manufactures specifications*
- *Front entrance roof/porch noncompliant with approved plan and remain unsupported*
- *Head flashings not sealed against joinery*
- *Minimum ground clearances not established*
- *DPM to back porch consists of unknown material likely non-compliant with E2/AS1*
- *Visible separation of mitres in external joinery*
- *Roof/ Wall junctions non-compliant with approved plan and manufactures specifications*
- *No continuous cavity batten in place to soffit*
- *Interior load bearing walls have incorrect stud spacing*
- *Photos provided of purlin fixings however it is apparent on site that purlin fixings are missing in some areas*
- *Upper floor brace connections not fixed into subfloor framing*
- *Oversized holes and notching throughout all timber framing*
- *Double packed ceiling battens in garage otherwise in accordance to approved consent*
- *Intermediate subfloor framing fixings missing throughout*

- *Beam B2 not located under upper level frame.*
- *SP3 connections non-compliant with approved plan*
- *Incorrect fixings to WANZ bars*
- *Damage evident to roofing paper throughout*
- *Brick sill flashing detail to external joinery non-compliant with approved plan*
- *Internal balustrade system unsupported and requires redesign.*
- *Timber joists have large gaps against supporting boundary joists, nails and joist hanger fixings and connection unable to be adequately achieved*
- *Insufficient clearance under external joinery.*

[25] The noncompliance items were noted as contravening Clauses B1, B2 and E2 New Zealand Building Code 1992.

[26] The [Omitted] required the following remedial action:

- *Laboratory analyses of all timber framing due to its long term weather exposure and the possibility of decay or degradation to the timber framing. The analysis will need to determine the extent of remediation that may be required in order to bring the framing into compliance with Clauses B1 and B2 NZ Building Code 1992.*
- *Laboratory analyses of the current levels of timber preservative in all timber framing and the extent of remediation that may be required in order to bring the framing into compliance with Clause B2 NZ Building Code 1992.*
- *Provide a review from the structural engineer and truss manufacturer in regards to extent of remediation necessary to bring the cut and altered roof trusses into compliance with Clause B1 and the truss manufactures specifications and warranty.*
- *Demonstrate how all obscured external fixings such as purlin fixing, roof bracing, stud to top plate, lintel and truss connections (not inspected by PCC) comply with the building consent, building code and manufacturer's specifications.*
- *Remediation plan which addresses all deviations from the engineer's structural design which includes approval from the structural engineer for the proposed remediation.*
- *Provide a remediation plan as to how the deck substrate and associated fixings will be brought into compliance with the building consent and Clauses B1, B2 and E2 NZ Building Code*
- *Put in place immediate support to the Dangerous unsupported patio roof and unsupported front entrance roof*
- *Provide a remediation plan which addresses incorrectly installed roof and wall wrap/paper*

- *Provide a remediation plan which addresses the incorrect fixings of WANZ support bars*
- *Address all matters noted above and identified during the course of the 24 September 2018 site visit.*

[27] The complaint was supported with photographs depicting the noncompliant work. The photographs were reviewed, and the Complainant clarified the noncompliance issues.

[28] The Board questioned the Respondent as to whether he carried out any of the building work himself. He stated that it was completed under his supervision. He described himself as the project manager. The persons carrying out the work were initially described by him as apprentices. Further questioning ascertained that they were labourers working as contractors and that one of them later went on to take on an apprenticeship. He did have one experienced builder in Wellington, but that person was engaged on the build of his own house.

[29] The Respondent who is, and was at the time, residing in Auckland stated he would travel to Wellington every Friday to check on the work. The on-site staff booked inspections. The Complainant stated the Respondent was not present at them.

[30] The Respondent was questioned as to why he did not pick up or deal with the issues noted in the failed inspections and Notice to Fix prior to inspections being called or after the failed inspections notices were issued. The Respondent was unable to articulate why other than to state that he may have missed some issues.

[31] In general, the Respondent was evasive in his answers to questions about specific building compliance issues. He displayed a lack of knowledge of what was occurring on site or of the issues raised in the Notice to Fix.

[32] The Respondent stated his staff had let him down and that once he had a more experienced person on site the work started to progress in a more orderly fashion. He stated that he was in the process of dealing with the issues in the Notice to Fix when the complaint was made.

[33] The Respondent also stated, in his initial response to the complaint that the complaint was a personal attack on him, that the Complainant was an unreasonable inspector who was not professional. He further noted that he had engaged a consultant to deal with timber frame weathering and that they were in the process of dealing with the other issues that were raised.

Board's Conclusion and Reasoning

[34] 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); and

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

and **should** be disciplined.

[35] The reasons for the Board's decisions follows.

Negligence and/or Incompetence

[36] Negligence and incompetence are not the same. In *Beattie v Far North Council*[8] 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.*

[37] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[9] test of negligence which has been adopted by the New Zealand Courts[10].

[38] 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"*.

[39] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[12]. 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.

[40] 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 Act[13]. 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[14].

[41] The Board notes that the purposes of the Act are:

> ***3 Purposes***
> *This Act has the following purposes:*

[8] Judge McElrea, DC Whangarei, CIV-2011-088-313
[9] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[10] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[11] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[12] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[13] *Martin v Director of Proceedings* [2010] NZAR 333 at p.33
[14] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> *(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.*

[42] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[15] and be carried out in accordance with a building consent[16]. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[43] 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.*

[44] The Board notes the Respondent's role in the build was as the supervisor. The question for the Board was whether the Respondent has been negligent and/or incompetent as regards his supervision of the building work.

[45] Supervise is defined in section 7[18] 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—*

[15] Section 17 of the Building Act 2004
[16] Section 40(1) of the Building Act 2004
[17] [2001] NZAR 74
[18] 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.

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

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

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

(b) the experience of the person being supervised;

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

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

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

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

[48] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992[19]. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

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

[49] It was clear to the Board that the Respondent was derelict in his duties as a supervisor. He had unskilled labourers on site. The Respondent was residing in Auckland. The building work was in Wellington. He attended once a week and when on site he did not carry out adequate checks of the building work or ensure that compliance issues were being dealt with. If he had then such an extensive list of noncompliance issues would not have arisen. Moreover, they would have been dealt with in a timely manner and further inspections would not have been called until such time as they were resolved.

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

[50] It is also not acceptable to state that matters were being dealt with. The majority of the issues should not have arisen in the first place. It was clear that the labourers on the site carrying out the work were out of their depth and were not receiving any guidance or direction. As a result, it was falling to the *[Omitted]* who were carrying out inspections to provide instructions by way of their site notes.

[51] The Building Consent Authority's role is to check that the building work has been carried out in accordance with the building consent, not to instruct builders on how to build. Licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified the Board would expect prompt action to be taken and that there would not be repeated failings of the same items as occurred on this site. In this respect during the first reading of changes to the Act around licensing[20] it was noted by the responsible Minister:

> *In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*

[52] 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 legislation[21]:

> *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.*

[20] Hansard volume 669: Page 16053
[21] Hansard volume 669: Page 16053

[53] Section 3 of the Act, which sets out the Act's purposes notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

> ***14E Responsibilities of builder***
>
> *(1) In subsection (2), builder means any person who carries out building work, whether in trade or not.*
>
> *(2) A builder is responsible for—*
>
> *(a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
>
> *(b) ensuring that building work not covered by a building consent complies with the building code.*
>
> *(3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
>
> *(a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
>
> *(b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[54] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

[55] That was not the case with regard to the Complainant. There were repeated failures of the work carried out under his supervision and no real steps taken to ensure compliance was achieved.

[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 (negligence) as and that has not displayed the abilities, skills or knowledge required to supervise building work (incompetence). The Board also finds that the conduct was sufficiently serious enough to warrant a disciplinary outcome of the Respondent being found to have been both negligent and incompetent.

<u>Contrary to a Building Consent</u>

[57] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. 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.*

[58] 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.

[59] The inspections that were carried out identified numerous matters that were not in accordance with the building consent.

[60] Unlike negligence, contrary to a building consent is a form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence has to be established.

[61] Given the above the Board finds that the disciplinary offence has been committed. The Board does note that there is an element of duplication in this finding and that of negligence and incompetence. It will take that into consideration when looking at penalties where it will treat the two disciplinary offences as a single offence.

Penalty, Costs and Publication

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

[63] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

<u>Penalty</u>

[64] 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*[22] 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:

[22] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

> *[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.*

[65] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[23]. The High Court when discussing penalty stated:

> *[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[66] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[67] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[24] the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[68] The Respondent has been found to have been both negligent and incompetent. The level of the negligence displayed was high. The Respondent has failed to understand that as a Licensed Building Practitioner he is responsible for his work as well as the work of those under his supervision.

[69] The most serious matter before the Board is the finding of incompetence. As noted above incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. The licensing regime is predicated on licensed building practitioners holding those abilities and the requisite skill and knowledge. The path to becoming licensed involves an assessment of those qualities.

[70] 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

[23] [2012] NZAR 481

[24] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.

[71] The Respondent's offending has been aggravated by his attitude toward the complaint and the Complainant. In this respect the Board notes that manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be an aggravating factor that can be taken into consideration by the Board. In *Daniels v Complaints Committee*[25] the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.

[72] Taking all of the above factors into account the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required 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.

[73] Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of six (6) months.

<u>Costs</u>

[74] 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."

[75] 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[26].

[76] In *Collie v Nursing Council of New Zealand*[27] 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.*

[77] Based on the above the Board's costs order is that the Respondent is to pay the sum of $5,500 toward the costs of and incidental to the Board's inquiry. In setting the costs the Board has taken into account the costs incurred in the Respondent seeking an adjournment at a hearing that had commenced.

[25] [2011] 3 NZLR 850.
[26] *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.
[27] [2001] NZAR 74

Publication

[78] 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[28]. 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.*

[79] 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.

[80] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[29]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[30]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[31]. 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].

[81] 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[33]. 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.

[82] Based on the above the Board will order further publication. Publication is required so that other members of the profession are made aware of the conduct and can learn from it and so that the public are adequately warned of the Respondent's loss of licence.

Section 318 Order

[83] 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**

[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

Board orders that the Respondent may not apply to be relicensed before the expiry of six [6] months.

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $5,500 (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(1)(iii) of the Act.**

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

[84] 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

[85] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **15 January 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.

[86] 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 and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 18th day of December 2019

Richard Merrifield
Presiding Member

[i] ***Section 318 of the Act***

(1) In any case to which section 317 applies, the Board may

(a) do both of the following things:

(i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

(d) order that the person be censured:

(e) order that the person undertake training specified in the order:

(f) order that the person pay a fine not exceeding $10,000.

(2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

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

[ii] ***Section 330 Right of appeal***

(2) A person may appeal to a District Court against any decision of the Board—

(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

(a) within 20 working days after notice of the decision or action is communicated to the appellant; or

(b) within any further time that the appeal authority allows on application made before or after the period expires.