

Before the Building Practitioners Board

	BPB Complaint No. CB25069
Licensed Building Practitioner:	Munesh Chand (the Respondent)
Licence Number:	BP 129866
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 but continued as a Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Dates:	3 September 2019 and 8 July 2020
Decision Date:	20 July 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Bob Monteith, LBP, Carpentry and Site AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1 (July 2020 hearing only)
Robin Dunlop, Retired Professional Engineer (September 2019 hearing only)

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 sections 317(1)(b) of the Act.

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Introduction

- [1] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at *[Omitted]*. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); 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 persons⁵:

... 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 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.

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

- [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.

Consolidation

- [9] The Board may, under Regulation 13, consolidate two or more complaints or inquiries into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [10] The Board sought agreement for consolidation of this matter with complaint number CB25434. The consent of all those involved was forthcoming. The two matters were consolidated.

Background to the Complaint

- [11] The complaint was part heard on 3 September 2019. It was adjourned, part heard, to allow the Board to make further inquiries. Those inquiries arose as a result of evidence heard at the adjourned hearing, which identified other licensed building practitioners who may have carried out or supervised the building work being investigated. The consolidated matter came about as a result of the further inquiries.
- [12] The Board has maintained a quorum of Board Members across the two hearings.
- [13] The 3 September 2019 hearing also identified *[Omitted]* as a Licensed Building Practitioner who may have carried out or supervised building work at the property. The Registrar provided the Board with a report that identified that Mr Dhillon was not licensed at the time the work was carried out. His licence was issued after his involvement in the property had come to an end. The Board did not proceed any further with its investigations into him as it did not have any jurisdiction to do so.
- [14] Prior to the 8 July 2020 hearing, the Complainant notified the Board that he was withdrawing the complaint. The Board resolved, under regulation 17(2) of the Complaints Regulations to continue with the matter as a Board Inquiry.

Evidence

- [15] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [16] 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.

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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

Munesh Chand	Respondent
[Omitted]	Respondent in CB25434
[Omitted]	Summonsed witness
[Omitted]	Summonsed witness
[Omitted]	Witness For the Respondent

- [18] The matters being investigated related to failed inspections and a Notice to Fix being issued in respect of an alteration and extension of an existing residential dwelling under a building consent. The following inspections were noted in the Council documentation:

Date	Event	LBP Noted on File	LBP Noted as Attending
22 May 2017	IFG Framing Checklist	Munesh Chand	Munesh Chand, [Omitted]
19 October 2017	IFG Framing	Munesh Chand	Munesh Chand
28 February 2018	ICA Cavity Wrap	Munesh Chand	[Omitted]
20 March 2018	ICA Cavity Wrap	Nil	Munesh
28 March 2018		Munesh Chand	Munesh Chand, [Omitted]
17 October 2018	IME – Site Meeting	Nil	[Omitted]
5 November 2018	ICA Cavity Wrap	[Omitted]	[Omitted]

- [19] The inspection on 5 November 2018 noted the following issues:

Existing weather boards have been removed, as per Councils instruction.

Cavity wrap used is a mixture of Thermakraft 220 and Watergate Plus. Plans specify Watergate. The following items have been found to be non compliant

Building Wrap is very damaged as a result of removing weather boards. It has also been exposed to the weather for a long time and has deteriorated. All building wrap is to be removed.

Some Cavity battens have been replaced with ripped down plywood, of unknown treatment. Cavity battens must be compliant with NZBC B1, B2 & E2

If cavity battens are more than 450 mm apart, other forms of retaining them is required to reduce cavity being compromised as stipulated in the 4 "D" s of cavity requirements.

The new beam in the rafter area of the northern room on the second level requires assesment by a suitably qualified person, to ensure it is fit for purpose. A Minor Variation is required

Window support bars must be fixed with stainless steel screws at 300mm centres.

Complex critical junctions, such as deck to wall junctions require specific detailing review from the engaged designer for each area.

The blockwork at the front entrance on the southern side has not been inspected for suitable reinforcing. A Certificate of Acceptance (COA) is required for this work that has not been inspected.

New timber that is supported by the blockwork on the southern side is required to have a damp proof course between the block and timber.

Deck on south eastern side has fall towards the house. This differs from plans.

NOTE: # The scaffold around the building is not safe, and in some places is directly bearing upon the new deck membrane. The scaffold tag is not current. The builder is required to immediately contact the scaffold company and have it made compliant, with a current safety tag.

The site needs to tidy, so that inspectors can carry out inspection safely. There is a large amount of timber lying around with nails protruding from them.

Once building wrap is removed, a full framing inspection is required to ensure that no changes have been made from the consented plans.

Designer to visit site and assess each critical junction. Specific Flashing details are required for junctions around deck areas and other complex areas.

Photo provided of scaffold staff on site by end of day 24th october

Due to the unsafe state of the scaffold, Council was unable to view top level. Therefore, this list is not exhaustive, and will require further assessment.

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Today's inspection is supposed to be a framing inspection. Builder not ready as he has re wrapped the building.

A full framing inspection is required before any further inspections. This includes all new roofing, trusses and purlins and rafters.

Timber consultant to visit site to assess timber. An assessment of the frame saver application is also required. Ensure his full notes are kept on site

Suitably qualified engineer to visit site to assess framing and unauthorised work. Ensure their notes are kept on site. All wall and roof bracing to be reassessed ALL saddle flashings to comply with E2 in regard to installation ALL plumbing and electrical work to be completed before next inspection ALL bracing to be recalculated When ready, book a double time slot with Council for a framing inspection.

Result Fail

[20] A Notice to Fix was issued on 12 November 2018:

- 1. A blockwork structure has been constructed outside the front entry on the lower level that has no recorded inspections of any reinforcing steel within it.*
- 2. Steel posts with corrosion evident was to be assessed by an engineer. There is no record of this occurring.*
- 3. Two coats of frame saver is required to be applied to all exiting external wall framing. This was not completed, as described in previous inspection notes.*
- 4. Threshold heights to decks was mentioned in numerous inspection notes, yet there is no evidence that they comply with the Building Code.*
- 5. Wall bracing is required to be re-calculated by an engineer.*
- 6. Roof framing that has been installed does not comply with the Building Code, nor the consented plans.*

This list is not exhaustive.

[21] The evidence before the Board was that several licensed building practitioners were involved in the building work. The Respondent's evidence, at the adjourned hearing, was that the building work to which the failures related to was the work of other licensed building practitioners, namely:

- (a) *[Omitted]* who the Respondent stated had been subcontracted by him to carry out building work on an extension to the dwelling; and
- (b) *[Omitted]* who was carrying out remedial cladding work separate from the Respondent.

[22] The Board directed that Board Inquiries are, pursuant to regulations 17 and 18 of the Complaints Regulations, were to be initiated into *[Omitted]* and *[Omitted]*.

- [23] The Registrar's Report into *[Omitted]* identified that he was not licenced at the time the building work was carried out. As such, he had to be supervised when carrying out restricted building work.
- [24] The Board, in respect of the consolidated hearing into *[Omitted]*, was satisfied, on the balance of probabilities, that he was not involved in the building work identified in the failed inspection or the Notice to Fix.
- [25] The Respondent, at the resumed hearing, did not contest that the building work was non-compliant. Rather, on being advised that *[Omitted]* was not licensed, the Respondent and *[Omitted]* gave evidence that *[Omitted]* was being supervised by a *[Omitted]*, a person who had not, till then, been identified. The Respondent also gave evidence that he was on-site on a regular basis.
- [26] The Board carried out further investigations to ascertain whether *[Omitted]* was supervising *[Omitted]*. *[Omitted]* was spoken to on 15 July 2020 and advised of the following which was recorded in a contemporaneously made note:
- *He refused to provide an affidavit;*
 - *He did not work there at the address [Omitted];*
 - *He had nothing to do with the build at all;*
 - *[Omitted] worked there under someone else's LBP, but he did not know who it was;*
 - *He just went and looked at it (the address) in good faith, [Omitted] spent about half an hour there at the address;*
 - *He knew [Omitted] as he has supervised him before on other jobs at other addresses, he was his [Omitted] sub-contractor;*
 - *He wasn't paid any money at all in relation to looking at the job or being at the address;*
 - *He only went there the one time (to the address);*
 - *[Omitted] went to India after the job finished, he thought;*
 - *[Omitted] doesn't know what the issue is around the job, who the homeowner is or who the contractors involved are; and*
 - *He was aware of his obligations if he supervises people. He knows to provide documents' and a ROW.*

Board's Conclusion and Reasoning

- [27] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);

- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
and **should** be disciplined.

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

Negligence and/or Incompetence

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

[30] The finding relates to the Respondent's supervision of non-licensed persons.

[31] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁷ 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.

[32] 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*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.

[33] 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*¹⁰ it was stated as "*an inability to do the job*".

[34] The New Zealand Courts have stated that assessment of negligence and or incompetence in a disciplinary context is a two-stage test¹¹. 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.

[35] 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 Act¹². 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

⁷ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁰ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

¹² *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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 practitioner¹³.

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

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[37] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁴ and be carried out in accordance with a building consent¹⁵. 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.

[38] There was substantial and detailed evidence of serious non-compliant building work by way of the Council inspections and a Notice to Fix.

[39] The Council's role is to check that the building work has been carried out in accordance with the building consent. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not always follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:

- (a) whether there is any form of system or process to identify quality and/or compliance issues;
- (b) the extent and seriousness of the non-compliance;
- (c) whether there is a pattern of continued non-compliance; and

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

(d) what steps are taken when non-compliance issues are raised.

[40] The Board considers that 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 they would not repeat the same failings. In this respect during the first reading of changes to the Act around licensing¹⁶ 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.

[41] 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 legislation¹⁷:

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.

[42] 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.*

¹⁶ Hansard volume 669: Page 16053

¹⁷ Hansard volume 669: Page 16053

- (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.*

- [43] 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. This was clearly not occurring.
- [44] The Respondent's position was that he was not responsible for the non-compliant building work as he was not supervising the persons who were carrying out the building work.
- [45] The Board has decided, on the basis of the evidence before it, that the Respondent was, on the balance of probabilities, the supervising licensed building practitioner. In this respect, the Board notes that the Respondent's evidence constantly changed. Initially the Respondent stated that other licensed persons had carried out the work. When it became apparent that [Omitted] was not licensed, he changed his story and introduced a new licensed building practitioner as the supervisor. That person has denied any involvement.
- [46] The Board notes the Respondent's initial version of events was that the building work was being carried out and supervised by [Omitted]. If that was his belief and understanding at the time, then there would not have been any need, nor requirement, for [Omitted] to be supervised. The Respondent's later evidence that [Omitted] was being supervised by [Omitted] was clearly inconsistent with that earlier statement.
- [47] The Board also notes that the Respondent should, if he believed [Omitted] was licensed, have made inquiries as to his status. The Register of Licensed Building Practitioners is a public register. Licensed persons carry an Identification Card. There is no impediment to the Register being searched or a card being produced. The Board would expect a licensed person to make carry out the appropriate investigations prior to engaging another to carry out restricted building work. The Respondent's failure to do so was, in itself a negligent act.

[48] Further, the Board rejects the Respondent’s evidence that he was not the supervising licensed building practitioner. He was clearly involved in site inspections and was giving instructions to persons on site. As such, even if there were other licensed building practitioners involved, the Respondent had sufficient involvement in the project for the Board to make a finding that he was responsible for the non-compliant building work.

[49] With regard to the Respondent’s supervision, supervise is defined in section 7¹⁸ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

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

[50] 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, but ultimately the Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance. In this instance, there was a very high level of non-compliance.

[51] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁹. 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.”

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.

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

- [52] As noted above, the Respondent was ignorant of the building consent failures that were occurring on site. He failed, in a very fundamental way, in his duties as a supervisor. The on-site issues would have been patently obvious. Immediate action should have been taken but was not. The Respondent allowed the build to continue and issues to accumulate and compound.
- [53] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has both departed from what the Board considers to be an accepted standard of conduct and that he has failed to display skills required to be a licensed building practitioner. The Board further finds that the Respondent's conduct was sufficiently serious to warrant a disciplinary outcome.

Contrary to a Building Consent

- [54] 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.*

- [55] 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.
- [56] The Council inspection records note an accumulation of matters that required minor variations. Additionally, and more importantly from the perspective of the Respondent's conduct, the Council inspections records show that there was extensive building work that had been completed under the supervision of the Respondent which did not comply with the building consent.

Penalty, Costs and Publication

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

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

Penalty

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

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

- [60] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²¹. 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.

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

- [62] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²² 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

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

²¹ [2012] NZAR 481

²² 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.

- [63] The Respondent has committed three disciplinary offences. The Board does, however, note the commonality in the disciplinary offending in the negligence/incompetence finding and the finding as regards building contrary to a consent. As such, it will treat those as a single offence.
- [64] 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.
- [65] 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.
- [66] The Respondent's offending has been aggravated by his claiming that others were responsible for supervision. He has not taken responsibility and has attempted to blame others.
- [67] 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. He has shown little if any understanding of the licensing regime under which he carried out restricted building work.
- [68] 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 and to protect the public.
- [69] Cancellation will also ensure that the Respondent's competence is reevaluated under the Licensed Building Practitioners Rules 2007 if and when he seeks to obtain a new licence.
- [70] 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.

Costs

- [71] 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."
- [72] 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 case²³.

- [73] In *Collie v Nursing Council of New Zealand*²⁴ 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.

- [74] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a half-day hearing of a matter of this type. It is less than 50% of actual costs.

Publication

- [75] 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 Act²⁵. 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.

- [76] 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.
- [77] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁸. 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*²⁹.

²³ *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.

²⁴ [2001] NZAR 74

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ Refer sections 200 and 202 of the Criminal Procedure Act

²⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁹ *ibid*

- [78] 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 interest³⁰. 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.
- [79] Based on the above, the Board will order further publication by way of Code Words and the Board's website. The Respondent will be named.

Section 318 Order

- [80] 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 six [6] months..

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (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(I)(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.

- [81] 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

- [82] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **14 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.
- [83] 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

³⁰ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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

Right of Appeal

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

Signed and dated this 24th day of July 2020



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) within any further time that the appeal authority allows on application made before or after the period expires.*