

Before the Building Practitioners Board

	BPB Complaint No. CB25422
Licensed Building Practitioner:	Alan Chellp (the Respondent)
Licence Number:	BP 119947
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Type:	In person
Decision Date:	11 December 2020

Board Members Present:

Mr M Orange, Deputy Chair, Legal Member (Presiding)
Mrs F Pearson-Green, LBP, Design AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Mr F Thomas, LBP, Roofing

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 Boards Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act.

Contents

Summary of the Board's Decision	2
The Hearing	2
The Charges	2
Function of Disciplinary Action	3
Inquiry Process	4
Evidence	4
Board's Conclusion and Reasoning	11
Penalty, Costs and Publication	15
Penalty	15
Costs.....	16
Publication	17
Section 318 Order	18
Submissions on Penalty, Costs and Publication	18
Right of Appeal	19

Summary of the Board's Decision

- [1] The Respondent has negligently supervised the roofing work that did not meet acceptable standards. His licence is to be suspended for a period of six months. He is ordered to pay costs of \$3,500.

The Hearing

- [2] The Board, on receiving a Registrar's Report in respect of the matter, reviewed the file and decided to deal with it by way of a Draft Decision.
- [3] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.

The Charges

- [4] 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 offence the Board resolved to investigate was that the Respondent may have carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

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

- [5] The Board gave notice that it would, at the hearing, further investigate the building work shown in the photographs provided with the complaint and noted in a report provided by [Omitted] dated 11 October 2019.

Function of Disciplinary Action

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

- [7] 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.”

- [8] 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.

- [9] 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.

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

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

Inquiry Process

[11] 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.

Evidence

[12] 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.

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

Allan Chellp	Respondent
[Omitted]	Complainant
[Omitted]	Witness

[14] The following is a summary of the evidence as recorded when the Board made its Draft Decision.

[15] The Respondent was engaged in relation to a new residential dwelling. The Respondent's record of work for the build notes that he supervised the "Roof cladding or roof cladding system". The record of work included a note stating:

*Has not been completed. I not be allowed. 2 flashing have not been supplied.
Product warranty failed
Must be redone*

[16] The record of work establishes that the Respondent supervised the roofing work.

[17] The Board was provided with a report about the building work from [Omitted] of [Omitted] and a report from [Omitted] of [Omitted]. The Board was also provided with photographs of the allegedly non-compliant roofing work.

[18] The report from [Omitted] noted:

The workmanship carried out on the roof is extremely poor & would no doubt fall a council inspection. From poor ridging to not turning up sheets, bellow is

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

a list of issues that would need to be addressed for a quality finish and to pass an instruction. Unfortunately %80 of the flashings and ridging is not Reusable.

Ridging - I photos 1,2,3,4 you see ridging that has been cut with a grinder leaving exposed metal which will began to rust in the very near future. Every ridging lap

On the job is to a poor standard & would certainly cause issues in the future. There has been no attempt to join the round tops on the ridges & the ends have been cut off flush to the sheets (with a grinder) allowing no extra materials to turn down for a tidy finish. All ridging needs to be replaced.

Aprons meeting ridging - in photos 5,6 you will need a number of holes though out the junctions. To make good of these issues new flashing will be needed. Before installing ridges the aprons should be completely tagged riveted & sealed.

Aprons - in photos 7,8,9 you will see aprons with no miters, sealing or riveting all which should be taken out during the application of that aprons. Many areas are also not tagged around the framing work at corners nor have they any length for the next flashing to be riveted and sealed on top. Apron flashings that run parallel with the roofing rib need to have a 30 mm metal turn down you will see in photos six that the flashing has a soft edge and also does not have the right amount of cover for this area.

Roofing iron - no photos of this point. The sheets have not been turned up which can allow wind & water to blow up & over into the building. Due to the use of grinding for all the cuts there are areas of rust on the roof that will need to be well cleaned to Eliminate rusting & damaging of the paint on the new sheets. Sheets have also been lapped the wrong way.

In conclusion the following steps need to be taken to make the roof at 36 Trias Road be considered an acceptable standard of roofing & water tightness

- Removal all current roof flashing & dispose*
- Turn up the pans of all sheets*
- Replace any sheets that do not have the required cover*
- Clean off all rust spores from entire roof area*
- Re order all flashings & ridges with correct coverage & angles*
- Instal flashings in accordance with E2 & New Zealand roofing standards*
- Use correct silicon & fixings*
- Ensure all swari & metal is blown off the roof at the end of each day*



Photo 1

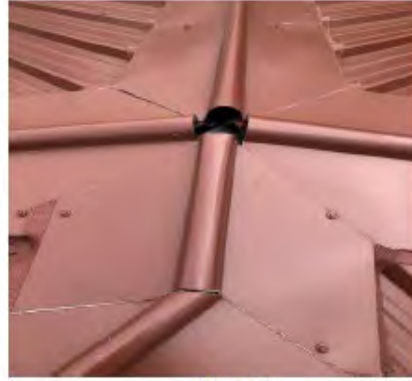


Photo 2



Photo 3



Photo 4



Photo 5



Photo 6



Photo 7



Photo 8



Photo 9



Photo 10

[19] The report from [Omitted] noted:

3. Roofing

- *The roofing is the main area of concern with the owner, due to the building fitting the roof rather than using an experienced roofing contractor. This has resulted in the selection and installation of incorrect materials.*
- *The fitting of section of the roofing is also below the standards required of a roofing contractor that will ensure full weather tightness of the roof including long term reliability.*
- *Many roofing screws are missing and need to be installed to meet the required standards for the high wind zone the property is in.*
- *The roof framing is also missing critical members required for securing ridge capping and apron flashings.*

[20] The [Omitted] report was also accompanied by photographs, including the following:



[21] The Respondent provided a written response to the complaint in which he noted that issues arose as a result of the Complainant taking over the management of the project. Regarding the roofing work the Respondent stated:

Conclusion.

1. *The roofing work was carried out in the best achievement which could be get in extremely difficult weather and safety- condition and as a result has eliminate frame treatment failure for [Omitted] best interest.*
2. *The roof and cladding haven't been completed due to [Omitted] failure to supply materials in time and his order to stop work.*
3. *The roof and cavity system need assessor investigation and replacement accordingly, due to stay long time espoused to weather without' completion. Again [Omitted] fault.*
4. *I can't provide warranty for stated above building part due to product failure and my work record will contain those facts.*
5. *[Omitted] couldn't and wouldn't get anyone who able to do what me and my team did for him in those circumstances.*
6. *It is his responsibility for achieved result in according him project management decisions and direct orders to stop work across technological process.*

It was very hard to work under his request for saving, saving and saving.

It was very hard to balance between saving, technology and safety needs.

It was very hard to manage students and casual labor supplied by [Omitted] to achieve appropriate result. And provide qualified labor for the bottom market price.

However, I had managed all issues depended from me successful by my professional skills. But I couldn't ignore [Omitted] direct orders.

[22] The Respondent also called into question the opinion of [Omitted] expressing his opinion that [Omitted] was conflicted.

[23] The Respondent provided a further email response in which he stated:

Please note and record the fact: I insist that my ROOFING work proposal was right due to

1 Engineering common sense and simple common sense to provide flashing heat expansion compensation by separating each flashing.

2 My proposal was made exactly according to manufacture recommendation to maintain product warranties

3 I do not believe that third party roofing contractors opinion is based on right understanding or expansion compensation system.

4. We had follow to design concept. There was good designer solution presented in stamped plane to meet product warranties by cover all flashing junction by cap flashing.

5. Also, please record: Roofing product was failed because [Omitted] refuse to pay for safe access for roofing work and for existing scaffold as well. He fail to supply specified flashing in time and even before he leave New Zealand. And we were not be able to complete started in rainy weather roofing work for stated above and other reasons. There was left over work, such fit out cap flashing, trim previously cut edges, complete roofing sheet fixing and inspect it by me.

[24] At the hearing, [Omitted] confirmed his on-site observations and findings.

[25] The Board also heard evidence as regards the contractual relationships surrounding the work. The Respondent was the main contractor. He entered into a full build contract with the Complainant. He then subcontracted to other entities which he claimed to have no connection to⁷. He also claimed that the labour was supplied by the Complainant. The Complainant noted that he was required to pay invoices to three separate entities and, at times, in cash. He refuted that he had supplied the labour.

⁷ The Respondent stated that the entities were his former wife's. His former wife was the Respondent's support person at the hearing.

- [26] As noted, the Respondent tried to distance himself from the entities that were paid for building work. He stated he only supervised and was not responsible for the work that was carried out. It was apparent, however, that whilst the Respondent may not have been a shareholder or director of those entities, he did have connections to them and that he was involved in the operations of those companies and the building work that they carried out. As an example, it became apparent through the evidence heard that the persons who carried out the roofing were known to the Respondent and that they had previously undertaken roofing work under this supervision and that at least one of the persons was perceived by the Respondent as a competent roofer who knew what to do.
- [27] The Respondent stated that the building work on the roof had been carried out in accordance with the building consent but that it was not complete in that there was a capping flashing that had to be manufactured and installed which would cover the gaps shown in the ridge caps. As noted above the Respondent also gave evidence that he only supervised the work. He described his supervision as having been limited as he was only being paid for supervision and was not being paid to be on site. He claimed the Complainant only wanted him to be on-site for Council inspections. The Respondent stated he spent about half an hour to an hour on supervision of the roof. He later amended that to being on-site on three occasions for a total of two hours. He described his supervision process as giving instructions and checking the work prior to an inspection.
- [28] The Respondent also noted that the roof had to be done in a rush so as to close it in because of weather and that the weather conditions when the work was carried out were poor. He stated this impacted on the work. The Respondent also stated that the workers did not have the correct tools and that the Complainant would not pay the hire charges for those tools. The Complainant noted that there were periods of good weather when the roof could have been installed but was not.
- [29] The Respondent gave evidence that if he had been given the opportunity to review and inspect the roofing work, he would have picked up any issues that required rectification.
- [30] The Board reserved its decision to allow it to obtain the building consent to evaluate whether the cap flashing referred to was specified in the building consent.
- [31] The Board received and reviewed the building consent file. The consented plans show a cap flashing. The completed on-site construction was, however, at variance to the construction detail in the building consent. For example, a ridge hip to upper wall detailing did not match as the apron flashing shown on plans sits under the cavity battens and cavity closure, with an additional powder-coated aluminium flashing to be installed over the top of the apron flashing. The cavity battens and closure have been installed so the apron flashing cannot be installed. Cavity closures have also been set above the flashing upstands. It will, therefore, not be possible to

maintain the min 75mm cover of the cladding over the flashing. The building wrap had not been taped as per the consented details

- [32] The Respondent made a further written submission after the completion of the hearing. Whilst it was not called for the Board has taken it into consideration. The submission reiterated the Respondent's evidence and submissions made at the hearing and called the work of [Omitted] into question.

Board's Conclusion and Reasoning

- [33] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and **should** be disciplined.
- [34] The finding relates to the Respondent's supervision of roofing work.
- [35] 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.
- [36] The New Zealand Courts have stated that the assessment of negligence in a disciplinary context is a two-stage test¹⁰. 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.
- [37] 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 Act¹¹. 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 practitioner¹².
- [38] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

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

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *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.*

[39] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[40] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

[41] Turning to the evidence that was before the Board, the reports noted clear contraventions from the Building Code. It was also clear from the photographs provided that the roofing work would not have met the requirements of Clause E2 of the Building Code in that it would have leaked.

[42] The Respondent, in his initial responses, indicated that the work was not complete, gaps have been caused by expansion and that further flashings needed to be installed. Whilst any one of those matters may have been a contributing factor it was clear to the Board that the work was not carried out in an acceptable manner in the first instance.

[43] At the hearing, the Respondent reaffirmed that a capping was to be installed and that this would have sealed the areas. Whilst, on review of the building consent, this proved to be correct other aspects of the work that had been carried out were not in

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

accordance with the consented plans, the progress of construction was such that those details cannot now be complied with without deconstruction. There was also evidence of poor workmanship.

- [44] 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 licensing,¹⁶ 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.

- [45] 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 of 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.

- [46] 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:

¹⁶ Hansard volume 669: Page 16053

¹⁷ Hansard volume 669: Page 16053

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.*

[47] 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.

[48] As noted, the Board's decision relates to the Respondent's supervision of non-licensed persons. 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.*

[49] 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 that ultimately the Board needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[50] 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

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

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.”

- [51] The Respondent’s position was, in essence, that his supervision was restricted because of a reluctance by the Complainant to pay him. He claimed to have no relationship to those that were carrying out the work, but it was clear to the Board that he had a prior working relationship with them. It was also clear that the Respondent did not take his supervision responsibilities seriously. The work was undertaken without him ensuring that it was being done in a compliant manner.
- [52] Noting the definition of supervision and the statements and *Gallagher* and taking into account the non-compliant building work and the limited amount of time spent actually supervising the Board, which includes persons with extensive experience and expertise in the building industry, finds that the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Penalty, Costs and Publication

- [53] 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.
- [54] 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

- [55] 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

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

“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.

- [56] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²¹ 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [57] The Board’s indication in its Draft Decision was that a fine was appropriate. Having heard evidence at the hearing and, in particular as regards the way in which the Respondent undertakes building work and supervises others, the Board considers the offending is more serious than previously thought and that a more significant penalty is required.
- [58] In considering the sanction to be imposed, the Board is required to view in total the fitness of the Respondent to continue to practise. Included in this is the need to ensure that the public has confidence in the licensing regime.
- [59] 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. He has also tried to avoid responsibility by stating that other entities that he was not associated with were responsible for the work. That was not the case. In all, the Respondent has not taken any responsibility for his conduct.
- [60] As noted above 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.
- [61] Taking all of the above factors into account, the Board considers that the suspension of the Respondent’s licence is not only warranted to punish the Respondent but also required to deter others from such conduct. The Respondent’s licence will be suspended for a period of six months.

Costs

- [62] 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.”

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

- [63] 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 case²².
- [64] In *Collie v Nursing Council of New Zealand*²³ 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.

- [65] The matter was dealt with at a hearing. The hearing was requested by the Respondent. Based on the principles 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. It is less than 50% of actual costs.

Publication

- [66] 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 Act²⁴. 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.

- [67] 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.
- [68] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁶. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁷. The High Court provided

²² *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.

²³ [2001] NZAR 74

²⁴ Refer sections 298, 299 and 301 of the Act

²⁵ Section 14 of the Act

²⁶ Refer sections 200 and 202 of the Criminal Procedure Act

²⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁸.

- [69] 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 interest²⁹. 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.
- [70] Based on the above, the Board will order further publication. The publication will focus on the responsibilities of a supervisor when restricted building work is being carried out.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of six [6] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.

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(l)(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.

- [72] 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

- [73] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 9 February 2021. 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.
- [74] 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

²⁸ *ibid*

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

out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 14th day of January 2021



Mr. M. Orange
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.*