

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

AGAINST

Hao Zhang, Licensed Building Practitioner
No. BP 123587

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 27 October 2015 in respect of Hao Zhang, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted] Auckland:
- (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 (other than as an owner-builder) or supervised restricted building that does not comply with a building consent (s317(1)(d).
- [3] The Respondent is a Licensed Building Practitioner with a Foundations Licence issued 6 April 2013 and a Carpentry Licence issued 1 May 2014. His licences were cancelled by the Board on 10 November 2015.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
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|------------------|--------------------------|
| Mel Orange | Board Member (Presiding) |
| Robin Dunlop | Board Member |
| Dianne Johnson | Board Member |
| Catherine Taylor | Board Member |
- [6] The matter was considered by the Board in Auckland on 2 August 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
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|---------------|----------------------------------------------|
| Sarah Romanos | Board Secretary |
| [Omitted] | Witness, Auckland Council Building Inspector |
| [Omitted] | Auckland Council |
| [Omitted] | Witness, Engineer (by phone) |

Members of the public were not present.

- [8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

- [9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 8 March 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- [11] On 23 March 2016 the Registrar’s delegate received additional information from the Auckland Council which related to the remedial works undertaken at the site. The information was collated into an Addendum to the Registrar’s Report.
- [12] On 31 March 2016 the Board considered the Registrar’s reports and in accordance with reg 10 it resolved to proceed with the complaint 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).
- [13] On 18 July 2016 a pre-hearing teleconference was scheduled. The Respondent did not confirm his attendance at it. The Presiding Member directed a prehearing information document be produced and sent to the Respondent to ensure he was informed of the procedures for the hearing.

Function of Disciplinary Action

- [14] The common understanding of the purposes 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 Kingdom¹.
- [15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

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

² [1992] 1 NZLR 720 at p 724

- [16] It must also be noted that the Board only has jurisdiction with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

The Hearing

- [17] The hearing commenced at 1.40pm.
- [18] The Respondent was served with the complaint documents on 5 November 2005 but did not engage in the process or provide a response to the complaint. Process servers were unable to track Mr Zhang to serve a summons for him to attend the hearing. The hearing continued in Mr Zhang’s absence.
- [19] The Board did not require the Counsel for the Registrar to attend the hearing. The opening summary which she had prepared to assist the Board was read into evidence by the Board Secretary. Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

- [20] The complaint relates to foundation work for a retaining wall being undertaken by the Respondent. It is alleged that he used an incorrect set out for the reinforcing steel in the foundations and when he became aware of the situation cut the starter bars off with the intention being to glue them in a new position. The allegation was that he did not inform anyone of this change and instructed the block layer to continue working, thereby cover the reinforcing and hiding the error. By proceeding in this manner he may have reduced the effectiveness of the design being inspected.

Evidence

- [21] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*³ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of

³ [2009] 1 NZLR 1

the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [22] There is no dispute that the Respondent carried out the works to the foundations and that the starter rods for the block retaining wall reinforcing were incorrectly placed and were in a different position to that shown on the building consent documents.
- [23] [Omitted], a Council Officer from Auckland Council was undertaking a scheduled inspection at an adjacent property and became aware of the changes that were being made to some of the vertical reinforcing. It was his evidence that starter bars had been cut and holes had been drilled in the concrete slab where repositioned bars could have been epoxied. The Auckland Council Inspection Records, Photographs and Site Meeting Notes were included in the evidence which accompanied the complaint. The Officer further advised that he had issued a Notice to Fix and work at the site was stopped.
- [24] It was the Engineer’s evidence that he was engaged to monitor engineering works at the project but had not been informed of the issue with the position of the reinforcing starters to the retaining wall until the matter was raised by the Council. He gave evidence that the defect to the steel would not have been able to be detected once the block wall had been erected and that alternative remedial options would have been available other than cutting the steel.
- [25] An engineered solution was prepared by the original engineer. Remedial works have been undertaken. The remedial works have been documented with the Auckland Council.

Board’s Conclusion and Reasoning

Negligence

- [26] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*⁴. Judge McElrea provided guidance on the interpretation of those terms:

[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.

[44] In my view a “negligent” manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an “incompetent” manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms “negligent” and “incompetent” have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that

⁴ Judge McElrea, DC Whangarei, CIV-2011-088-313

shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

- [27] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁵ as regards the threshold for disciplinary matters:

[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.

- [28] The Board notes most judicial comments as regards seriousness relate to the medical disciplinary jurisdiction and a charge of professional misconduct where the threshold is considered to be higher than that for negligence or incompetence. Some lean toward it being a matter for consideration in penalty whilst others see it as a factor in determining liability. The more recent judicial statements, however, tend toward the latter. For example in *Pillai v Messiter (No 2)*⁶ the Court of Appeal stated:

... 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.

- [29] On this basis the Board has taken the position that seriousness is a matter for consideration by it in determining whether or not the Respondent has been negligent or incompetent.
- [30] In this instance there is clear evidence of negligence in the placement of the reinforcing steel, in the cutting of the steel and in the commencement of remedial works without discussion or design input from the design engineer.
- [31] The Board notes that the Respondent only stopped work and took advice from the design engineer when ordered to do so by the Auckland Council.
- [32] These are very serious matters.
- [33] The Board is aware that this is the second complaint of a similar nature about the Respondent's work. At the first complaint the Board formed the view that the subject matter related to a serious but isolated incident. It is now apparent that there may be a pattern of behaviour where the Respondent is continuing to make mistakes and is not following due process in having the remedial works designed and monitored by a design engineer. As with the previous decision, in the Board's mind this takes the actions of the Respondent from just negligence into incompetence in that he has not only displayed a serious lack of care but also a serious lack of competence.

Contrary to a Consent

- [34] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from

⁵ [2001] NZAR 74

⁶ (1989) 16 NSWLR 197 (CA) at 200

the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken.

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

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

- [36] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [37] There is clear evidence of non-compliance with the building code on the same matters and reasoning as discussed at paragraphs 30-33 above.

Board Decision

- [38] The Board has decided that 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); 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.

Disciplinary Penalties

- [39] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Actⁱ.
- [40] The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.
- [41] As part of the materials provided to the Board for a previous Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration in this inquiry.
- [42] Given the nature of the disciplinary offending and the inability of the secretariat to communicate with the Respondent the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there are matters which the Board should take into consideration.
- [43] The Board is aware that the common understanding of the purposes 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

⁷ [2015] NZHC 3299 [18 December 2015]

*The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*⁸

- [44] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*⁹:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

- [45] The High Court in *Patel v Complaints Assessment Committee*¹⁰ has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[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.

- [46] The Board has decided that the appropriate penalty is one of cancellation of the Respondent's Licences (both carpentry and foundations) under s 318(1)(a)(i). The Board has further decided that the period in which the Respondent cannot reapply to be licensed under s 318(1)(a)(ii) is to be 3 years from the date of this decision. The Respondent may reapply at the expiry of this period but will have to meet the licensing competency criteria in applying to reobtain his licence.
- [47] The Board has not, in coming to its decision, considered this to be a second instance of disciplinary offending as it accepts that the present conduct occurred prior to the Board making a decision on the earlier matter. It has, however, taken into consideration as an aggravating matter the pattern of similar behaviour and the risk to the safety of persons and the integrity of buildings that this poses.

Costs

- [48] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [49] 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

⁸ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁹ [1992] 1 NZLR 720 at p 724

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*¹¹ included the following:

“It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”

[50] The judgment in *Macdonald v Professional Conduct Committee*¹² confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*¹³ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[51] In *Collie v Nursing Council of New Zealand*¹⁴ 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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court’s conscience as being excessive. Accordingly it is confirmed.

[52] The Board notes that the Respondent has not engaged in the complaint process but has not been obstructive in regard to the Board inquiry.

[53] The Board makes an order for costs of \$1,000 towards the costs of and incidental to the Board inquiry.

Publication of Name

[54] 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 Licenced Building Practitioners’ scheme as is required by the Act.

[55] The Board is also able, under s 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.

[56] 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.

¹¹ HC, Wellington, AP23/94, 14 September 1995

¹² HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹³ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹⁴ [2001] NZAR 74

- [57] On the basis of the evidence before it the Board does not consider broad further publication is required however it orders the Registrar to send a copy of this decision to the Auckland Council as the building consent authority where the Respondent is known to carry out or have carried out building works.

Penalty, Costs and Publication Decision

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

Penalty: Pursuant to s 318(1)(a)(i) of the Building Act 2004, the Respondent Licenses are to be cancelled and pursuant to s 318(1)(a)(ii) of the Act the Respondent may not apply to be re-licensed for a period of three years from the publication of this decision.

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

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

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

Submissions on Penalty Costs and Publication

- [59] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 13 September 2016.
- [60] If no submissions are received then this decision will become final.
- [61] 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.

Right of Appeal

- [62] The right to appeal Board decisions is provided for in s 330(2) of the Actⁱ.

Signed and dated this 23rd day of August 2016



Mel Orange
Presiding Member

ⁱ **Section 318 of the Act**

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

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- (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.