

**BPB Complaint No. C2-01450**

**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**

Ah Sui Ah Sui, Licensed Building Practitioner  
No. BP 124489

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**DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] [Omitted] (the Complainants) lodged a complaint with the Building Practitioners' Board (the Board) on 14 July 2016 in respect of Ah Sui Ah Sui, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [Omitted]:
- (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);
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);
  - (d) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 11 June 2013.
- [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:
- |            |                             |   |
|------------|-----------------------------|---|
| Mel Orange | Board Member<br>(Presiding) | Legal Member appointed under s<br>345(3) of the Act |
|------------|-----------------------------|---|

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Robin Dunlop	Board Member	Retired Professional Engineer
Bob Monteith	Board Member	Licensed in Carpentry and Site Area of Practice 2

[6] The matter was considered by the Board in Auckland on 21 February 2017 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:

Gemma Lawson	Board Secretary
Ah Sui Ah Sui	Respondent
[Omitted]	For the Complainant,
William Hursthouse	Technical Assessor to the Board
[Omitted]	Witness, Project Manager
[Omitted]	Witness, Building Inspector, [Omitted]

[8] No Board Member declared any conflict 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 7 November 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. It included a report from William Hursthouse as a Technical Assessor to the Board.

[11] On 7 December 2016 the Board considered the Registrar's report 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);
- (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
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).

[12] On 10 February 2017 a pre-hearing teleconference was convened by Mel Orange. The Respondent was present, the hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

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## Function of Disciplinary Action

- [13] 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<sup>1</sup>.
- [14] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>2</sup>:
- 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.*
- [15] In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>3</sup> Collins J. noted that:
- “ ... the disciplinary process does not exist to appease those who are dissatisfied with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*
- [16] The same applies as regards the disciplinary provisions in the Building Act.
- [17] It must also be noted that the Board has jurisdiction only 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

- [18] The hearing commenced at 1 p.m.
- [19] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

## Substance of the Complaint

- [20] The Complainant alleged the Respondent was negligent in how he carried out a conversion of a garage under a building consent into a residential dwelling. [Omitted], who assisted with project management at the later stages of the build and helped to put together the complaint, noted the following issues with the work:
- (a) no ridge flashing on part of the roof;
  - (b) no barge boards or fascia boards;

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

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</sup> [2016] HZHC 2276 at para 164

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- (c) no flashing on barge boards or fascia boards;
- (d) iron missing on part of the roof where it joins the existing building;
- (e) water leading into the property when it rained;
- (f) pallside weatherboards not in place;
- (g) head flashing over windows and ranch sliders incorrectly installed;
- (h) no foam sealant around windows or ranch sliders;
- (i) batts not installed to building inspector's satisfaction; and
- (j) poor and substandard workmanship.

[21] There was also an allegation that the Respondent failed to provide a record of work on completion of restricted building work.

[22] Issues were raised by the Complainant as to the length of time the conversion took and the amounts charged but these were not matters inquired into by the Board for the reasons set out in [17] above.

### Evidence

[23] 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*<sup>4</sup> 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 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.*

[24] The Respondent was engaged by the Complainants to convert an existing skyline garage adjacent to an existing dwelling into an extension of the dwelling. The work was undertaken under a building consent.

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<sup>4</sup> [2009] 1 NZLR 1

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- [25] The consent, as originally issued, required that all of the framing and trusses be replaced. It was, however, accepted by the building consent authority that the existing frames and trusses could remain and be replaced as required where rot was present. This was confirmed by [Omitted] the building inspector who considered it to be a minor amendment to the consent under s 45A of the Act. He stated it would have been accepted provided as built plans were submitted detailing the changes.
- [26] The Board engaged the services of a Technical Assessor to provide an independent technical assessment of the alleged deficiencies and non-compliance of the building work completed by the Respondent. The Technical Assessor's report dated 23 August 2016 noted the following

Item	Description of defective work as claimed (Ref to plans and specifications and photo no. #)	Contravention or non-compliance with the Building Act or related requirement set in Regulation	Relevant Building Code Clause/Sub-Clause	Analysis of non-compliance with regulatory or performance requirement (and applicable technical references)	Implication of the non-compliance
1	<p>Joinery units installed without specified 'sill supports'</p> <p><i>Refer to photos "Joinery 1 – 10" (Appendix C) and extracts from Palliside installation instructions and E2/AS1 (Appendix F)</i></p>	<p>Sections 14E (2) and 17 of the Building Act 2004</p> <p>Compliance with the Building Code and Building consent</p>	B1-structure, E2 External Moisture	<p>Palliside is a PVC weatherboard. As such it is outside E2/AS1, meaning it is an alternative solution. It is reasonable to expect the manufacturer's installation instructions to be followed carefully.</p> <p>Manufacturer's installation instructions (Palliside on a cavity) require a WANZ sill support where the joinery is cantilevered out by the cavity construction (attached) No such support bars were observed.</p> <p>E2/AS1 also has a "generic" requirement for a support bar in this situation, at 9.1.10.5 b) and as seen in Fig 72B (attached)</p> <p>There are large gaps under some windows</p>	<p>According to E2/AS1, at least all the joinery openings wider than 600mm require sill support bars installed; in particular the wide door units opening out onto the deck.</p> <p>The bottoms of the windows need to be finished as per the Palliside details, eliminating the large gaps currently present.</p>
2	<p>Jamb and head Palliside details not followed: inadequate cover / large gaps</p> <p><i>Refer to photos "Joinery 11 – 16" (Appendix C) and extracts from Palliside installation instructions and E2/AS1 (Appendix F)</i></p>	<p>Sections 14E (2) and 17 of the Building Act 2004</p> <p>Compliance with the Building Code and Building consent</p>	E2 External Moisture	<p>An elevated moisture content reading was obtained under the window in the master bedroom which has the largest gap under it, see photos "Joinery 6 – 10".</p>	<p>The instances of inadequate cover / large gaps need to be addressed according to the Palliside details.</p>

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Item	Description of defective work as claimed (Ref to plans and specifications and photo no. #)	Contravention or non-compliance with the Building Act or related requirement set in Regulation	Relevant Building Code Clause/Sub-Clause	Analysis of non-compliance with regulatory or performance requirement (and applicable technical references)	Implication of the non-compliance
3	<p>Air seals: The opening for the master bedroom door was not made wide enough, meaning there is no room for air seals either side.</p> <p><i>Refer to photos "Air Seal 1, 2" (Appendix C) and extracts from Palliside installation instructions and E2/AS1 (Appendix F)</i></p>	<p>Sections 14E (2) and 17 of the Building Act 2004</p> <p>Compliance with the Building Code and Building consent</p>	E2 External Moisture	<p>The opening was not made wide enough for this recycled door. With only a very narrow gap either side, there is no "pressure equalisation" chamber, and no room for a foam air seal as required by both the manufacturer's installation instructions and the Acceptable Solution.</p> <p>The narrow gap, being less than 6mm, allows for capillary attraction to carry water right through to the inside.</p>	<p>If a perfect air seal is formed on the inside, between the jamb and the plasterboard lining, this would help. However a better option would be to take out the joinery and widen the gap by 7 mm each side, creating a 10mm gap to form a "pressure equalisation" chamber and allowing a proper air seal to be installed in accordance with the manufacturer's details and the Acceptable Solution.</p> <p>Given this is a "High Wind" zone, particular care is required to prevent moisture entry.</p>
4	<p>Pergola</p> <p>This has been changed from what was consented</p> <p><i>Refer to photos "Pergola 1 – 10" (Appendix C)</i></p> <p><i>And sheet 14 on the consented plans (Appendix D)</i></p>	<p>Sections 14E (2) and 17 of the Building Act 2004</p> <p>Compliance with the Building Code and Building consent</p>	B1-structure, E2 External Moisture	<p>The plans show an unroofed pergola. The design has been changed to a roofed porch, which triggers additional requirements to resist uplift on this site as it is in a "High" wind zone.</p>	<p>The footings and structural connections will need to be rechecked and probably upgraded.</p> <p>According to [Omitted], a matching roofing profile is not readily available. If this is correct. The whole pergola roof structure will need to be disassembled and lowered to allow for either the consented gutter to be installed, or for a transition flashing to be installed.</p>
5	<p>Apron flashing ends, barge flashing. Neither of the two apron flashing ends has been well formed</p> <p><i>Refer to photos "Apron 1 - 6" (Appendix C)</i></p> <p><i>And sheet 9 on the consented plans (Appendix D) and</i></p> <p><i>Extract from E2/AS1 (Appendix F)</i></p>	<p>Sections 14E (2) and 17 of the Building Act 2004</p> <p>Compliance with the Building Code and Building consent</p>	E2 External Moisture	<p>On the south side, a kick out has been formed, but badly, with large gaps.</p> <p>One the North side no kick out has been formed (yet).</p> <p>See 5.1 in E2/AS1 (attached within Appendix F)</p> <p>The barge flashing does not provide sufficient cover to the new roof (photo "apron 6")</p>	<p>Both apron flashing ends need to be terminated as per E2/AS1, so they "direct water out from the wall cladding onto the roof cladding and gutter."</p> <p>An additional strip of roofing is probably the easiest way to deal with the inadequate cover seen in photo "apron 6" this will bring the junction into compliance with Figure 47 and Table 7 in E2/AS1</p>

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				See Fig 47 and Table 7 in E2/AS1 (attached within Appendix F for appropriate cover measurements)	(attached in Appendix F)
6	Plasterboard linings These have been poorly installed in many instances. <i>Refer to photos "Gib 1 - 18" (Appendix C) Extract from Specification (Appendix F)</i>	Sections 14E (2) and 17 of the Building Act 2004  Compliance with the Building consent	N/A	The consented specification refers to two different versions of Winstones "Site Guide" (Dec 2014 at 1.3 and 3.12; Jan 2010 at 3.8) Both have the same instructions for butt joints in ceilings, which were not followed. Many joints between wall sheets have been made at the corners of openings, where they will almost certainly crack. In addition many of the screws have been overdriven. The quality of the fixing is exceptionally low.	The short ceiling sheets where butt joints have been made over wooden battens ideally should be replaced with longer (4 metre) sheets. Alternatively, the sheets could be cut back to half way between 2 ceiling battens, in order for the join to be back blocked as per the Gib details (Appendix F)  Replacing the wall sheets to avoid joins in known high stress locations would also be preferable to avoid cracking in the future.

- [27] The Board worked through the issues detailed in the table with a focus on what was unfinished work, what was non-compliant work and/or of a poor standard. It was also established what was and was not the work of the Respondent.
- [28] It was established that the Respondent carried out some of the installation of the palliside weatherboards and that he also hired a subcontractor who completed most of it. A lot of it was redone by a subsequent contractor engaged by the Complainants to complete the build.
- [29] The Respondent was not able to identify the subcontractor he used other than as "Jacob". He stated he was a licensed person and that he had worked with him on numerous occasions. He stated the last time he had installed palliside weatherboards was 15 years ago.
- [30] It was also established that the Respondent was not working off the consented plans. He had the consented plans on site but was using an earlier version that had different details. He did not consult or refer to the consented plans.
- [31] It was noted that the weatherboards were consented as direct fix but were installed as a cavity system. Again the building consent authority considered this could have been processed as a minor variation.

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- [32] In terms of the missing sill support identified in Item 1 the Respondent stated he was relying on the installer to put them in after he had installed the windows. The Technical Assessor noted it would be normal for the sill support to be installed at the time of the windows being installed but that they could be installed at a later time albeit with more difficulty and with the risk that the window joinery would be scratched. The Respondent gave evidence that it was the first time that he had installed aluminium windows. His normal practice was to use subcontractors. The last time he had installed a window was some 30 years ago when he installed wooden windows.
- [33] As regards Item 2 the Respondent again stated it was a failing of the subcontractor who he asked to do the work as he was too busy. He also considered it could be attended to as finishing work. It was again noted that the sequence was that the windows were installed and then the cladding. The Respondent did not pick up that the work was poorly completed when he was on site.
- [34] In terms of Item 3 there was differing evidence as to whether the intention was to insert a new window or to reuse a window. Either way it was accepted by the Respondent that he carried out the work incorrectly.
- [35] Item 4, the pergola, was built to an earlier version of the plans. This was accepted by the Respondent as an error. The method of construction was also discussed with [Omitted] noting that the posts were merely placed on paving stones and not concreted as required. The Respondent gave evidence that the work was temporary and that he was going to prop the structure and pour concrete around and under the posts at a later time.
- [36] There was conflicting evidence as regards Item 5. The Respondent accepted that he carried out the roofing but did not do the flashings which were completed by a plumber engaged by the Complainants. [Omitted] stated the Respondent did do some of the flashings and sequence wise it is likely some of the flashings would have been installed before the pallisade. The Technical Assessor considered the flashings should not have been accepted as they were installed, regardless of who installed them.
- [37] The Technical Assessor noted, with regard to Item 6, that the plasterboard was installed the way it used to be back in 1990 and that technical literature has detailed different instructions since. The Respondent stated it was his work and that it was still to be finished. In questioning he accepted the work was not as per current requirements.
- [38] [Omitted] gave evidence as regards the sequence of the work noting that it was not logical to carry out internal work prior to the exterior being closed in and made watertight. The Respondent gave evidence that [Omitted] said it was alright for him to proceed with internal work. [Omitted] accepted that this was acceptable if modern building wrap was used.
- [39] As regards the record of work the Respondent considered the restricted building work was not complete. [Omitted] stated that as of July 2016 another contractor had been engaged to complete the building work and that the Respondent was aware that his services were no longer required. A site note of 15 July 2016 also noted a change in builder. The Respondent stated he would provide a record of work soon after the completion of the hearing.
- [40] [Omitted] noted the stress and financial hardship caused to the Complainants.



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- [41] The Respondent was asked whether he provided a disclosure and a contract as per the Building (Residential Consumer Rights and Remedies) Regulations 2014. He was unaware of the requirements and did not provide either.
- [42] The Respondent gave general evidence that he carried out about 50% of his work and subcontracts the rest. He noted that the job had cost him financially, that he had done the best that he could and that he generally regretted what had occurred and apologised to the Complainants.

## Boards Conclusion and Reasoning

### Negligence and or Incompetence

- [43] 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*<sup>5</sup>. 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 shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

- [44] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>6</sup> 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.*

- [45] The details of negligence and or incompetence were set out in the Technical Assessor's report. The Respondent accepted responsibility for some aspects but not for all it having engaged a subcontractor to carry out cladding, and the flashing work having been carried out by a plumber. Putting the flashings aside the Respondent has not identified who the licensed person responsible for the cladding was and, as such, the Board is proceeding on the basis that it was done under his supervision and that he is responsible for it.
- [46] The Technical Assessor's report detailed fundamental errors and clear instances of both non-compliant and poor quality work such that a finding of negligence can be made. The work was well below the standard to be reasonably expected of a

<sup>5</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>6</sup> [2001] NZAR 74

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licensed building practitioner. The Respondent was also negligent in not referring to or using the consented plans during the build.

- [47] The evidence heard by the Board also showed the Respondent was not familiar with modern building practices and requirements. An example was a lack of knowledge and skill in how to install windows and plasterboard. In this respect the Board also finds the Respondent has been incompetent.

### **Contrary to a Building Consent**

- [48] 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 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. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [49] In *Tan v Auckland Council*<sup>7</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

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

- [50] 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.
- [51] Work that has been carried out or supervised by the Respondent has failed to comply with the building consent issued. Whilst some aspects could be considered to be incomplete, the Board notes that the sequencing was such that it would be difficult to rectify them. Others such as the pergola were simply wrong and not as per the details in the consented plans.
- [52] The Board did not consider that the issues as regards framing, trusses or the addition of a cavity were contrary to the building consent as the building consent authority was prepared to accept these aspects as minor variations.

### **Record of Work**

- [53] There is a statutory requirement under s 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>8</sup>.
- [54] Failing to provide a record of work is a ground for discipline under s 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

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

<sup>8</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

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- [55] The Board discussed issues with regard to records of work in its decision C2-01170<sup>9</sup> and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [56] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder).
- [57] Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work.
- [58] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in s 88(1) simply states “on completion of the restricted building work ...”. In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events can, however, lead to situations where a record of work falls due prior to the intended restricted building work being completed.
- [59] This is what has occurred here. The contractual relationship came to an end in July 2016 and the Respondent knew or ought to have known that he would not be carrying out any further restricted building work. A record of work for what he had completed to that point in time was then due. As at the date of the hearing one had still not been provided to either the owner or the territorial authority. As such the elements of the disciplinary offence are made out.
- [60] Finally s 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [61] The Respondent has put forward a reason for the restricted building work being incomplete. As stated above this is not accepted as a good reason. That being the case the Board finds that the Respondent has failed to provide a record of work on completion of restricted building work as required by s 88 of the Act.

### **Board Decision**

- [62] The Board has decided that Respondent has:
- (a) carried out or supervised building work in a negligent and an incompetent manner (s 317(1)(b) of the Act);
  - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
  - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section

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<sup>9</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

and should be disciplined.

### Disciplinary Penalties

[63] 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 Act<sup>1</sup>.

[64] 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.

[65] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was the partial acceptance of responsibility and the apology offered.

[66] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on 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 further matters which the Board should take into consideration.

[67] As stated earlier 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.

[68] The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>10</sup> has 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.*

[69] In *Lochhead v Ministry of Business Innovation and Employment*<sup>11</sup>, an appeal from a decision of the Board, the court, in respect of penalty noted:

*[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in*

<sup>10</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>11</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

*this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.*

*[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).*

- [70] The disciplinary offending was serious and the Board considers the finding that the Respondent was incompetent is an aggravating factor. The licensed building regime was developed to enhance the quality of building in New Zealand and to prevent future systemic failures. Particular focus is placed on weathertightness and it is noted that the Respondent's work was at risk of failure in this respect. Ensuring weathertightness requires a knowledge of and skill in current building methods. That the Respondent does not know how to install a window in the modern environment is of particular concern.
- [71] Given the above factors the Board considers the only viable option open to it is the cancellation of the Respondent's licence. This is necessary to not only protect the public but also to ensure that, prior to the Respondent being able to undertake or supervise restricted building work in the future, his competence will be assessed as part of the licence application process.
- [72] The Respondent's licence will therefore be cancelled and the Board orders that he will not be able to reapply for a period of three months. The Board recommends that he uses this time to get up to date with current building methods and to gain experience under the supervision of a competent person.

### **Costs**

- [73] 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."
- [74] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*<sup>12</sup> 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*

<sup>12</sup> HC, Wellington, AP23/94, 14 September 1995

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*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.”*

[75] The judgment in *Macdonald v Professional Conduct Committee*<sup>13</sup> confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*<sup>14</sup> where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[76] In *Collie v Nursing Council of New Zealand*<sup>15</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

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

[77] On the basis of the above the Board considers the sum of \$1,000 is a reasonable sum for the Respondent to pay toward the costs or and incidental to the hearing. This is significantly less than the 50% level set out in the above court authorities.

### **Publication of Name**

[78] As a consequence of its decision the Respondent’s name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners’ scheme as is required by the Act.

[79] 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.*

[80] 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.

[81] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>16</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>17</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>18</sup>. In *N v Professional Conduct Committee of Medical Council*<sup>19</sup> the High Court pointed to the following factors:

<sup>13</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>14</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

<sup>15</sup> [2001] NZAR 74

<sup>16</sup> Section 14

<sup>17</sup> Refer ss 200 and 202 of the Criminal Procedure Act

<sup>18</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>19</sup> *ibid*

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*The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*

- *issues around the identity of other persons such as family and employers;*
- *identity of persons involved and their privacy and the impact of publication on them; and*
- *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[82] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>20</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[83] The Board will order further publication. This is considered a necessary step to ensure the public is aware of the Board's order and to put it into effect. It is also considered appropriate to publicise the matter to ensure other practitioners can learn from it.

### **Penalty, Costs and Publication Decision**

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

**Penalty:** Pursuant to s 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 s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 3 months.

**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 be action taken to publicly notify the Board's action by way of Code Words, the Board's website and such other publications as the Board considers appropriate.**

### **Submissions on Penalty Costs and Publication**

[85] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **11<sup>th</sup> April 2017**.

[86] If no submissions are received then this decision will become final.

[87] 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.

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<sup>20</sup> Kewene v Professional Conduct Committee of the Dental Council - [2013] NZAR 1055

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## Non Payment of Fines or Costs

[88] The Respondent should take note that the Board may, under s 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. Section 319 provides:

### **319 Non-payment of fines or costs**

*If money payable by a person under section 318(1)(f) or (4) remains unpaid for 60 days or more after the date of the order, the Board may—*

- (a) cancel the person's [licensing] and direct the Registrar to remove the person's name from the register; or*
- (b) suspend the person's [licensing] until the person pays the money and, if he or she does not do so within 12 months, cancel his or her [licensing] and direct the Registrar to remove his or her name from the register.*

## Right of Appeal

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

Signed and dated this 20<sup>th</sup> day of March 2017.



**Mel Orange**  
Presiding Member

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### <sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*



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- (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.*