

Before the Building Practitioners Board

	BPB Complaint No. C2-01649
Licensed Building Practitioner:	Neil Colliver (the Respondent)
Licence Number:	BP 121530
Licence(s) Held:	Carpentry, Site AOP 1, Design AOP 1

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

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	14 February 2014
Decision Date:	28 March 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Catherine Taylor, Lay Member

Appearances:

Geoff Hardy, Barrister and Solicitor, Special Adviser to the Board

Procedure:

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

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and 317(1)(da)(ii) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

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

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

Function of Disciplinary Action

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

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

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

[4] 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. It does not have any jurisdiction over contractual matters.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

[6] The Board heard evidence from:

Neil Colliver	Respondent
Brian Hughes	Complainant
Geoffrey Hardy	Special Adviser to the Board
[Omitted]	Witness

[7] The Respondent was engaged by the Complainant to construct a structurally insulated panel (SIP) house on land owned by the Complainant. The work started in March 2017 and was reportedly finished in April 2017. The Respondent was also the designer for the project having completed the design and submitted the design certificate for the building consent.

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

- [8] The Complainant alleged that the Respondent left [Omitted] in charge of the construction and that aspects of it were carried out in a negligent manner and/or not in accordance with the building consent issued. [Omitted] was not a licensed building practitioner.
- [9] The Respondent provided a written response to the Complaint. In it he stated that [Omitted] oversaw the assembly of the house along with two engineers. At the hearing it was clarified that the engineers were not on site but had been involved in the development of the SIP system. In questioning it was also ascertained that [Omitted] had some experience with the construction of SIP houses having assisted experienced builders in earlier builds. This was the second job that he had been in charge of. He had two other persons assisting up until the roof was installed at which time a third assisted. None of the persons assisting were licensed or experienced in building. They were noted to have been learning the SIP system. [Omitted] stated that on the first job that he was in charge of he had more experienced builders assisting him.
- [10] The Complainant provided photographs of work that he considered was substandard and/or noncompliant in support of the Complaint.
- [11] The Respondent generally explained in his response that the building work was not complete and/or that the issues would have been rectified. The Respondent also noted that some issues arose as a result of the Complainant's changes to the plans and that the Complaint was commercially motivated.
- [12] Subsequent to the Complaint being received, and as part of the Registrar's investigations, inquiries were made about whether records of work had been issued by the Respondent for the build. In response the Respondent submitted that the building work carried out was not restricted building work. He cited Determination 2014/064 in support of this contention.
- [13] Prior to the hearing the Board appointed a Special Adviser pursuant to section 322(1)(d) of the Act to assist the Board with the issue of whether the building work carried out or supervised by the Respondent was restricted building work as defined in the Act.
- [14] At the hearing the Respondent confirmed that he had supervised the building work which included construction of the foundations, the erection of the structurally insulated panels which also formed the roof, the installation of the windows into pre-cut openings and the construction of decks.
- [15] The Board inquired as to whether a building contract was in place prior to construction commencing as per the requirements of Part 4A of the Act. The Respondent stated that the contract was provided after the build had commenced.
- [16] The Respondent described the building issues raised by the Complainant as minor or "snag" list items.

- [17] The Complainant noted that the house was not positioned correctly on the site. The Respondent stated that the cut and fill was done by a subcontractor who was not licenced and that it was out by about 1 metre. [Omitted] found the error the next morning. The Respondent stated the issue would have a minimal impact and that he spoke to both the Complainant and the Council about it and obtained their consent to the new site position. The Respondent stated that he would, as part of the “as built” plans, have submitted the change as a minor variation under section 45A of the Act. This had not, at the time of the hearing, occurred. He did not have any documentation recording that he had obtained the consent of the Complainant or the Council to the change and noted that at the time he was on good terms with the Complainant and did not consider that it would become an issue.
- [18] The Board was provided with a Site Instruction Notice from the Council dated 10 February 2017. It noted:
- ... house has been shifted forward on the site (site dimensions still ok).*
- Submit an amendment to reflect the accurate position and the revised deck construction.*
- Foundation sizes differ from consented documents.*
- [19] The Council required an engineer’s PS4 prior to the foundation being poured. One was provided. The Respondent did not attend the site prior to the pour. [Omitted] did “facetime” the Engineer prior to it being undertaken. A record of work for the foundation was not done and the Respondent stated he was not asked for one.
- [20] The Respondent spoke of the SIP design and process describing it as a product innovation. He saw the process as applying kitset principles to house building and that this made the construction process easier and that less supervision of the building work was needed. He believed that a new licence class was needed so as to enable kitset type construction.
- [21] In questioning the Respondent stated that he attended the site on one occasion during the build when the roof was installed and that he had been to site once prior to the build starting. He stated that he kept in contact with [Omitted] during the build. He relied on what [Omitted] told him as regards progress and on building consent authority inspections.
- [22] At the hearing the Complainant provided the Board with a Site Report prepared by [Omitted]. It set out various quality and compliance issues including that external joinery had not been installed as per the requirements of E2/AS1 in that silicon sealant had been incorrectly applied. The Respondent stated that the silicon referred to was a secondary, not the primary, means of sealing the windows. The Complainant noted that the roof leaks and that the home has not been completed to code compliance standard.

[23] The photographs provided by the Complainant were reviewed in the hearing. The photos generally showed instances of poor and unsightly workmanship. Again the Respondent stated that the items were either not finished or could be remediated. He accepted that certain aspects had not been completed to the required standards such as some of the flashings around windows and doors and the finish on the deck but stated that those items would have been corrected or replaced as required. He noted that as he had not been allowed back on site remedial work had not been completed. The Complainant stated that the workmanship issues went beyond simple remediation and that many were not fixable.

Board's Conclusion and Reasoning

[24] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
 - (b) 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)
- and should be disciplined.

[25] The Board has decided that the Respondent **has not** 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).

[26] The reasons for the Board's decision follow.

Negligence and/or Incompetence

[27] 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*⁶. 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

⁶ 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.

- [28] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁷ 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.

- [29] The workmanship shown in the photographs provided to the Board was well below that expected of a licensed building practitioner. It was, in places, rough and amateurish. There was an over reliance on silicon to patch up errors and numerous instances of materials being cut short or installed poorly. Generally the standard of the work showed a lack of skill and care and it fell seriously below that which is expected. The Respondent did not, however, carry out the work. Rather it was completed under his supervision. The question then is whether he was negligent or incompetent in his supervision of the building work.

- [30] The terms “supervise” is defined in section 7 of the Act. The fundamental requirements are as follows:

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

- [31] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992⁸. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the

⁷ [2001] NZAR 74

⁸ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

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.”

- [32] In Board Decision C2-01143⁹ the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner’s obligations noting that the level of supervision required will depend on a number of circumstances including:
- (a) the type and complexity of the building work to be supervised;
 - (b) the experience of the person being supervised;
 - (c) the supervisor’s experience in working with the person being supervised and their confidence in their abilities;
 - (d) the number of persons or projects being supervised; and
 - (e) the geographic spread of the work being supervised.
- [33] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.
- [34] Looking at the factors noted above:
- (a) the work was not overly complicated;
 - (b) the persons being supervised had very limited experience and or skill;
 - (c) the Respondent had some experience in working with [Omitted] but not with the other persons engaged for the project whose skills and knowledge were less than those of [Omitted];
 - (d) there were a number of persons on site and the Board heard evidence that the Respondent had other projects underway; and
 - (e) the work was in a remote location.
- [35] The Board also notes that the Respondent only made one visit to the site during the build. The Respondent’s supervision could be described as remote and hands off. The Respondent appears to have been swayed by the perception that the kitset type build is simple and, as such, that minimal supervision was needed. The quality issues with the build, however, indicate that this was not the case. The Board considers that if the Respondent had been to site more frequently and had the supervision been closer, then most of the items would not have occurred. The Board, which includes persons with extensive experience and expertise in the building industry, therefore finds that the Respondent’s supervision has fallen below the standard expected of a licensed building practitioner and that the conduct has been sufficiently serious enough to warrant a disciplinary finding of negligence.

⁹ Board Decision dated 14 April 2016

Contrary to a Building Consent

- [36] 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.
- [37] The matters which were of concern were the installation of the windows and the siting of the house. The Board was satisfied that the windows were installed in accordance with E2/AS1 and that the error in the siting of the house was going to be dealt with as a minor variation. The other matters complained of relate to workmanship and have been dealt with in the finding of negligent supervision.

Record of Work

- [38] The Board instructed a Special Adviser to assist it with its record of work investigations. The Special Adviser provided a very comprehensive and useful report. Included in it were background investigations that are pertinent to the issues at hand. The Special Adviser reported a statement from the Respondent in the Complaint documentation that:

“Our homes are exempt from needing an LBP as apart from the foundations, they have no Restricted Building Work, being assembled from pre-fabricated panels” and “we are the only company in NZ with nationwide pre-consented houses with exemption from MBIE for needing a Licensed Building Practitioner to build them”.

- [39] The Registrar, and later the Special Adviser, queried the exemption with the Respondent who referred to email correspondence with the Ministry of Business Innovation and Employment (“MBIE”) which included receipt from MBIE of Determination 2014/064 and a request from the Respondent of MBIE for a separate licence class to assemble SIP homes.
- [40] The Respondent also provided the Special Adviser with copies of emails with the Registrar. He noted emails of 1 and 10 February 2017 which showed that the Respondent had made diligent and conscientious enquiries of MBIE to ask that a new licence class be created to enable his company to assemble its prefabricated houses on site. They also contained assurance that “Ultimately, SIP panel construction is not within the scope of the general carpentry class and therefore ... is not RBW”. In support of this a link to Determination 2014/064 was provided.
- [41] The Special Adviser completed an analysis of the legislative provisions relating to restricted building and provided his opinion that the building work related to SIP was restricted building work.

- [42] It is clear to the Board that the Respondent relied on advice from MBIE as regards whether or not SIP was restricted building work. Putting aside the question of whether or not the building work was restricted building work the question for the Board is whether he was entitled to rely on that advice.
- [43] Reliance on erroneous advice from an official can be a defence to an administrative type offence. In *Wilson v Auckland City Council (No 1)* [2007] NZAR 705 (HC) the appellant was convicted of having carried out building work pending the grant of a building consent. On appeal, it was argued that the council had a policy of permitting building prior to the obtaining of a consent, although the council denied this. The Court commented that the defence of officially induced error could not be discounted as forming part of New Zealand criminal law, although it held that there was no factual basis for that defence in the case. In *Tipple and Gun City Limited v Police* (1994) 11 CRNZ 132 Holland J found that where a person committed a crime believing it to be lawful on the grounds of “officially induced error” it was in the public interest as well as being just that that person should not be held criminally liable.
- [44] The Board considers the Respondent was given, and relied on, official advice from the Registrar and the Respondent, on the basis of it, has not provided a record of work.
- [45] Turning to look at the elements of the disciplinary offence, failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. The section does, however, provide for a defence of a “good reason” for not providing a record of work. As regards the SIP building work the Board finds that the Respondent did have a good reason in that he was provided with authoritative advice that the building work in question was not restricted building work.
- [46] The issues relating to the provision of a record of work do not, however, stop there. There was other building work that the Respondent supervised that did not form part of the SIP building work, specifically construction of the foundations and window installation. These aspects were not covered by the advice received from the Registrar and as such no reliance can be placed on it with regard to them. The Respondent was required to provide a record of work for both aspects but has failed to do so.
- [47] It is noted that with regard to the foundations the Respondent stated that he was not asked for a record of work for them. In this respect the obligation is on the licensed building practitioner to provide one, not on the owner or the territorial authority to request one. The Respondent should have acted of his own accord and not waited for others to remind his of his obligations. On this basis the Board finds that the disciplinary offence has been committed.

Did the SIP Building Work Require a Record of Work

- [48] The Board considers that it is important for it to state its position on whether the SIP building work was restricted building work. This is important so that other building practitioners will know what their obligations are when it comes to carrying out or supervising such work and to the provision of records of work for it.
- [49] In Board Decision C2-01307 the Board considered a similar question with regard to the application of proprietary plaster systems over autoclaved aerated concrete panels. In that case MBIE had also taken the position that the building work was not restricted building work. The Board decided, on the basis of the legislative provisions relating to the restricted building work, that it was and as such that a record of work was required.
- [50] Turning to the analysis of the legislative provisions section 84 of the Act provides:
All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.
- [51] Section 401B of the Act allows building work to be declared as restricted building work by Order in Council:
401B Order in Council declaring work to be restricted building work
(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.
(2) An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.
(3) The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.
(4) Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.
- [52] The Building (Definition of Restricted Building Work) Order 2011 was then passed to establish restricted building work. Clause 5 of the Order stipulates:

- 5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
- (1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
- (2) *This clause applies to building work that is—*
- (a) *the construction or alteration of—*
- (i) *the primary structure of a house or a small-to-medium apartment building; or*
- (ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*
- (b) *of a kind described in subclause (3); and*
- (c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
- (3) *The kinds of building work referred to in subclause (2)(b) are—*
- (a) *bricklaying or blocklaying work;*
- (b) *carpentry work;*
- (c) *external plastering work;*
- (d) *foundations work;*
- (e) *roofing work.*

- [53] On the basis of the Order there are three requirements which need to be met. Dealing with each as they relate to the case before the Board:
- (a) it must relate to the construction or alteration of the primary structure or the external moisture-management system of a house or a small-to-medium apartment building. The SIP building work in question related to both the primary structure and the external moisture management system of the home;
- (b) be of a kind described in subclause (3) of the Order. Subclause (3) includes in (3)(b) carpentry and as such this element is also satisfied; and
- (c) be of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.
- [54] Section 285 of the Act allows for licence classes to be designated by regulation. The designation is contained in clause 4 of the Building (Designation of Building Work Licensing Classes) Order 2010. It creates a class of licence for Carpentry and stipulates it covers “*carpentry for any building that is ... category 1, 2 or 3*”.
- [55] The Respondent is licensed in Carpentry and as such the third element of the test is satisfied.

[56] The interpretation taken by the Ministry and that set out in Determination 2014/064 related to the performance indicators within the competencies set out in the Licensed Building Practitioners Rules 2007 (the LBP Rules). The LBP Rules:

set out the standards of competence that building practitioners must meet in order to be licensed, and detail the procedures for assessing competence and issuing licence cards. The Schedule to the Rules describes the competencies for the Design, Site, Carpentry, Roofing, External Plastering, Bricklaying and Blocklaying, and Foundations licensing classes.¹⁰

[57] LBP Rule 4 states:

Minimum standard of competence for each class of licence

- (1) *The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
- (2) *In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

[58] It is clear that the Rules are for the purpose of evaluating whether or not an applicant for a licence meets the applicable minimum standard when seeking a building licence. They do not determine what is and is not restricted building work and cannot be read in such a way as to limit what has been declared as restricted building work.

[59] The Rules can, however, provide a guide as to the delineation between classes of licence and a guide as to the types of work that come within a licence class. In this respect it is noted that for Carpentry Schedule 1 of the Rules states:

<i>Descriptor:</i>	<i>This licence class covers practitioners working as carpenters on any category of building.</i>
<i>Competencies:</i>	<p><i>Competency 1: Demonstrate knowledge of the regulatory environment of the building construction industry.</i></p> <p><i>Competency 2: Demonstrate knowledge of current building and trade practice.</i></p> <p><i>Competency 3: Carry out planning and scheduling for carpentry work.</i></p> <p><i>Competency 4: Carry out carpentry work.</i></p> <p><i>These competencies may be demonstrated by meeting some or all of the following performance indicators.</i></p>

[60] As can be noted from the final note about the Competencies above a practitioner does not have to demonstrate all of the performance in a competency to be

¹⁰ Explanatory note to the Licensed Building Practitioner Rules 2007

evaluated as competent. Moreover not every building method or type of material is covered and again the competencies are not a fully comprehensive list of what a licensed building practitioner can and cannot do.

- [61] The Rules go on to describe the Performance Indicators for each of the Competencies. The Board presumes that it was from within the Performance Indicators that the MBIE advice to the Respondent that SIP was not restricted building work was derived as structurally insulated panels are not mentioned. The Board notes, however, that even if the Performance Indicators were used for a basis for determining to scope of what is and is not restricted building work the Performance Indicators do refer to pre-fabricated elements. For example:

<i>Performance Indicators</i>	<i>Competency 4: Carry out carpentry work</i>
	<p>4.5 <i>Prepare works to receive pre-cast/pre-fabricated and in-situ elements and install.</i></p> <p><i>May include but not limited to - proprietary suspended floor systems, steel beams and proprietary beams, pre-cast structural elements, architectural pre-cast concrete units and any temporary propping systems.</i></p>

- [62] As such, even if the approach from the Determination was taken, SIP would come within restricted building work as it involves prefabricated elements.
- [63] There is also a general principle of statutory interpretation that general provisions do not derogate from specific ones¹¹. In this respect the Licensed Building Practitioners Rules 2007 are general in their nature whereas the Building (Designation of Building Work Licensing Classes) Order 2010 and Building (Definition of Restricted Building Work) Order 2011 are far more specific in their provisions and should be preferred.
- [64] The Special Adviser also noted that it was not necessarily rational to exempt such work:

4.4.4 SIP houses are still houses, and they still require to be constructed. They do not arrive on-site fully made-up like a transportable home, ready to be placed on the foundations and then made available for immediate use. They take time and skill to assemble and to connect up to the foundations and the necessary services. They require a team of tradesmen to install them over a period of several weeks (in the case of a standardised product) or several months (in the case of a bespoke product as in the present example). In short, they require substantial human input, and human input is fallible.

¹¹ Refer Burrows and Carter Statute Law in New Zealand 5ed 2015 page 475

- 4.4.5 *Structural Insulated Panels still have to be manufactured and installed competently, as do the joinery and other penetrations to the external envelope to ensure structural integrity and weathertightness. The individual panels are stand-alone components that still have to be connected to each other and sealed against the elements. The panels themselves are not the only components of a SIP house. There is still scope for the building to fail to meet the performance requirements of the building code if not assembled to the required standard.*
- 4.4.6 *Most importantly, exempting SIP houses from the licensing regime risks ushering in the cowboys again. It would provide a loophole through which unscrupulous operators could develop substandard housing by simply manufacturing or importing (say, from China) prefabricated panels that would enable them to avoid the need for LBP oversight of everything except the design and foundations. And all this without any guidelines as to what degree of prefabrication is required to constitute an exempt SIP construction.*
- 4.5 *It therefore seems highly unlikely that Parliament would have intended this consequence. Admittedly Parliament may have unintentionally overlooked this anomaly when enacting the legislation, or the situation may simply be due to the Bureaucracy not promoting legislative changes fast enough to keep pace with developments in construction methods. However if the Board is to reach the conclusion that SIP houses (or for that matter, straw bale, rammed earth, natural log or stone masonry houses) were in fact intended to be exempt from the licensing regime, then it would require some fairly compelling reasoning. That reasoning so far seems to rely heavily on Determination 2014/064, so it is essential that we review that Determination in some detail.*

[65] The Board has already dealt with what it considers was erroneous analysis of restricted building work in that Determination. The Special Adviser noted, as regards the finding in the Determination:

It seems to defeat the purpose and intention of the licensing regime in that it leaves certain homeowners exposed to a lesser degree of protection than others.

It creates considerable uncertainty as to what is RBW and what is not, particularly since there is no guidance as to what degree or what complexity of novel building method carries the relevant house over the threshold.

It delegates what is effectively law-making power to the Bureaucracy, the Board, and the Minister of Building and Construction, who are charged with the responsibility for formulating and approving the LBP Rules (albeit that

Parliament can disallow any of the LBP Rules pursuant to section 362 of the Building Act 2004).

[66] The Special Adviser also provided his opinion that:

I believe it is more likely that Parliament intended that all residential building work that is critical to the structural integrity or weathertightness of a household unit should be carried out or supervised by a licensed building practitioner. The licensing classes were left deliberately open rather than prescriptive so that you could slot the work into the most appropriate category, whichever seemed the most suitable.

[67] The Board agrees. Restricted building work should be interpreted in such a way so as to advance the purposes of the legislation, not in such a way as to defeat them and the protections they offer.

[68] It should also be noted that whilst a determination is binding between the parties it does not necessarily have a wider effect. In *Weaver v HML Nominees Ltd*¹² the High Court held that a determination decision is a judicial decision for the purposes of considering whether an issue estoppel applied between the parties preventing them from re-litigating the matter. The High Court further held, however, that although the determination was binding on the parties there was no issue estoppel broader in scope than that.

[69] The Board therefore considers that determinations are influential and are to be taken note of but the Board is not bound to follow decisions made within them.

[70] Based on the above analysis the Board finds that the SIP building work was restricted building work and that a record of work should have been provided for it. As already noted though the Respondent was entitled to rely on the erroneous advice given and that, as such, he had a good reason not to provide one as regards the SIP building work only.

Penalty, Costs and Publication

[71] 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.

[72] 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.

¹² [2013] NZHC 2080

Penalty

[73] 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*¹³ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

[74] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁴ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[75] The Respondent has been found to have committed two disciplinary offences. The starting point for a record of work matter is normally a fine of \$1,500 and for negligence, such as what has occurred, a fine of \$3,000. The Board considered, however, that a combined fine of \$3,000 was more in order and it has further reduced this to \$2,500 based on the mitigation heard.

Costs

[76] 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."

[77] 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 case¹⁵.

[78] In *Collie v Nursing Council of New Zealand*¹⁶ 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.

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

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

¹⁵ *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.

¹⁶ [2001] NZAR 74

- [79] Based on the above the Board's costs order is that the Respondent is pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry. This is far less than 50% of actual costs.

Publication

- [80] 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 Act¹⁷. 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.

- [81] 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.
- [82] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁸. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁹. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁰. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²¹.
- [83] 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 interest²². 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.
- [84] Based on the above the Board will not order further publication. The Board will, however, publicise the general findings around restricted building work so that licensed building practitioners are better informed. The Respondent will not be named or identified in the communication.

Section 318 Order

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

¹⁷ Refer sections 298, 299 and 301 of the Act

¹⁸ Section 14 of the Act

¹⁹ Refer sections 200 and 202 of the Criminal Procedure Act

²⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²¹ *ibid*

²² *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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 section 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.

- [86] 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

- [87] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **19 April 2018**. 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.

Right of Appeal

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

Signed and dated this 28th day of March 2018



Richard Merrifield
Presiding Member

ⁱ **Section 318 of the Act**

- (1) In any case to which section 317 applies, the Board may
- (a) do both of the following things:
 - (i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and

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- (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.