

## Before the Building Practitioners Board

	BPB Complaint No. CB25702 and CB25858
Licensed Building Practitioner:	Harry Conroy (the Respondent)
Licence Number:	BP 119958
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	16 December 2021
Decision Date:	23 December 2021

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AOP 2  
Mr B Monteith, LBP, Carpentry and Site AOP 2  
Mrs F Pearson-Green, LBP, Design AOP 2

#### 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.

#### Disciplinary Finding:

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

The Respondent **has not** committed a disciplinary offence under section 317(1)(c) of the Act.

**Contents**

**Summary of the Board's Decision**..... 2

**The Charges** ..... 3

**Function of Disciplinary Action** ..... 5

**Inquiry Process** ..... 6

**Background to the Hearing** ..... 6

**Evidence**..... 7

    Ground Floor Bearer ..... 9

    Timber Remediation ..... 9

    Roof Structure..... 11

    Weatherboards ..... 13

    Record of Work..... 15

**Board's Conclusion and Reasoning**..... 15

    Negligence..... 16

    Contrary to a Building Consent – Building Consent Changes ..... 20

    Record of Work..... 22

    Outside of Competence – Design Work..... 24

**Penalty, Costs and Publication**..... 25

    Penalty ..... 26

    Costs..... 27

    Publication ..... 28

**Section 318 Order**..... 29

**Submissions on Penalty, Costs and Publication** ..... 29

**Right of Appeal**..... 30

**Summary of the Board's Decision**

[1] The Respondent carried out building work in a negligent manner and in a manner contrary to a building consent. The Respondent also carried out building work that was outside of his competence (design work) and failed to provide a record of work on completion of restricted building work. He is fined \$3,500 and ordered to pay costs of \$3,500. The disciplinary action will be recorded on the public register for a period of three years. The Board will also undertake further publication. An article on The Wrap-up will be published summarising the matter.

## The Charges

- [1] The hearing resulted from a complaint (CB25702) about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The complaint was made by the son of the owners. The alleged disciplinary offences the Board resolved to investigate, based on that complaint, were that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 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) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [2] The Board gave notice that, in further investigating the allegations under sections 317(1)(b) and 317(1)(d) of the Act, the Board would be inquiring into the following:
- (a) the quality and compliance of connections between ground floor timber piles, bearers and/or timber joists (complaint document 2.1.8, page 22 of the Board's file and Engineer's Site Inspection Reports No.1 and No.2 – Complaint Documents 2.1.166 and 2.1.167, pages 180 to 181);
  - (b) the quality and compliance of support to an existing structural steel beam (complaint document 2.1.8, page 22 of the Board's file and Engineer's Site Inspection Report No 4 – Complaint Document 2.1.169, page 183 of the Board's file);
  - (c) whether external wall insulation was installed (complaint document 2.1.8, page 22 of the Board's file);
  - (d) the alignment of timber wall framing (complaint document 2.1.8, page 22 of the Board's file and Engineer's Site Inspection Report No. 10 – Complaint Document 2.1.175, page 189 of the Board's file);
  - (e) whether walls were plumb and true (complaint document 2.1.8, page 22 of the Board's file);

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

- (f) the sizing of existing ceiling joists (complaint document 2.1.8, page 22 of the Board's file);
- (g) whether an existing ground floor bearer to the south wall of the lounge was replaced as required by the building surveyor (complaint document 2.1.8, page 22 of the Board's file);
- (h) the construction of the roof (complaint documents 2.1.15 and 2.1.178, pages 29 and 192 of the Board's file and Engineer's Site Inspection Report No. 6 – Complaint Document 2.1.171, page 185 of the Board's file) including roof pitch (complaint document 2.1.17, page 31 of the Board's file);
- (i) timber remediation issues as noted in the Dilapidation Survey dated 2 July 2020 (complaint document 2.1.50, page 64 of the Board's file);
- (j) a change from a concrete to a timber floor without a consent change (Engineer Site Inspection Report No. 2, Complaint Document 2.1.67, page 181 of the Board's file);
- (k) the compliance of the gap between deck and the front of the house and the house (Engineer Site Inspection Report No. 2, Complaint Document 2.1.67, page 181 of the Board's file);
- (l) the span of a beam and notching of the top plate (Engineer's Site Inspection Report No. 10 – Complaint Document 2.1.175, page 189 of the Board's file); and
- (m) whether minor variations or amendments were obtained for changes to the building consent prior to the building work being carried out.

[3] Prior to the hearing, the Complainant laid a new complaint with the Board about the Respondent. With the Respondent's consent, the allegations made in the second complaint (CB25858) were dealt with as part of the hearing. The revised charges that the Board gave notice that it would consider at the hearing<sup>2</sup> were that the Respondent may have:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act in that he may have:
  - (i) built the roof structure in a manner that did not comply with the building code,
  - (ii) constructed a wall cladding<sup>1</sup> cavity system in a manner that did not comply with the building code,

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<sup>2</sup> A Revised Notice of Hearing was issued consolidating the matters to be considered at the hearing.

- (iii) failed to follow acceptable practices in relation to the changes to the building consent in respect of changes to the construction methodology of the roof structure;
  - (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise contrary to section 317(1)(c) of the Act, IN THAT, he may have carried out design work that was restricted building work in relation to the structural design of the roof;
  - (c) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT, he may have:
    - (i) constructed a wall cladding cavity system that did not comply with the building consent,
    - (ii) built the roof structure in a manner that did not comply with the building consent; and
  - (d) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have carried out design work that was not competent as a licensed carpenter to carry out.
- [4] The Board received a consolidated file with the evidence collected in respect of both CB25702 and CB25858.

### **Function of Disciplinary Action**

- [5] 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*<sup>3</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>4</sup>.
- [6] 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*,<sup>5</sup> 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."*

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<sup>3</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>4</sup> [1992] 1 NZLR 720 at p 724

<sup>5</sup> [2016] HZHC 2276 at para 164

- [7] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons<sup>6</sup>:

*... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

- [8] Finally, the Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.
- [9] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

### **Inquiry Process**

- [10] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [11] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Background to the Hearing**

- [12] At the commencement of the hearing, the Board clarified the allegations made and the matters to be further investigated at the hearing with the Complainant. As a result, items (a) to (f) and items (j) to (l) in paragraph [2] above were excluded. The remaining items to be investigated from the first Notice of Proceeding were:
- (g) whether an existing ground floor bearer to the south wall of the lounge was replaced as required by the building surveyor (complaint document 2.1.8, page 22 of the Board's file);

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<sup>6</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- (h) the construction of the roof (complaint documents 2.1.15 and 2.1.178, pages 29 and 192 of the Board's file and Engineer's Site Inspection Report No. 6 – Complaint Document 2.1.171, page 185 of the Board's file) including roof pitch (complaint document 2.1.17, page 31 of the Board's file);
- (i) timber remediation issues as noted in the Dilapidation Survey dated 2 July 2020 (complaint document 2.1.50, page 64 of the Board's file); and
- (m) whether minor variations or amendments were obtained for changes to the building consent prior to the building work being carried out.

[13] The remaining allegations and charges were considered unchanged from the Revised Notice of Proceeding.

### **Evidence**

[14] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[15] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

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

Harry Conroy	The Respondent
[Omitted]	The Complainant
[Omitted]	Homeowner
[Omitted]	Engineer
[Omitted]	Licensed Building Practitioner, Design AoP 2
[Omitted]	Building Surveyor
[Omitted]	Licensed Building Practitioner, Site AoP 2
[Omitted]	Porirua City Council, Building Consent Officer
[Omitted]	Porirua City Council, Building Consent Officer

[17] The building project related to the alteration and repair of an existing dwelling that was considered to have been subject to and at a risk of water ingress. The consented building work, in addition to alterations and additions to the existing structure,

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<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

included the construction of a new pitched roof with eaves in place of the existing very low pitch roof with parapets and internal butynol gutters, the installation of new cladding on a cavity system complete with new double glazed aluminium windows and the removal and/or treatment of decayed or at-risk framing timber (the remedial work). It was the remedial work that was complained about and, in particular, the manner in which the building work on the roof was carried out.

- [18] The Respondent put himself forward as an expert in weathertight homes remediation projects. He noted a number of previously completed projects, including some high-profile projects. The Respondent stated that he warned the homeowner that the scope of works would increase once the work got underway and that he had arranged a site meeting at the commencement of the project with the Building Consent Authority (BCA) to review items that would need to be addressed. The Respondent noted there were pre-existing issues with the building work carried out by the original builder and deviations from the original building consent. This, and the increased scope of building work, were matters that the Respondent tried to return to and use to defect questions about the manner in which he carried out or supervised building work under investigation during the hearing.
- [19] Before the project started, the Respondent introduced Mr [Omitted], the Architectural Designer who developed and submitted the building consent documents, to the homeowners. The Respondent engaged [Omitted] services, but he was paid by the homeowners. [Omitted] stated he received instructions from both the Respondent and the homeowner. [Omitted] had limited involvement during the building work post the issue of the building consent. He was not engaged to provide on-site construction observation or contact administration.
- [20] The design work required an engineer for aspects that needed specific engineering design. Mr [Omitted] of [Omitted] was engaged by, and paid by, the Respondent. He also provided construction monitoring services during the build as part of the building consent with his last formal observation being recorded in Site Inspection Report No. 12 dated 1 November 2019. The purpose of the visit was recorded as "view and establish the fixing requirements for the timber lintels beams and frames".
- [21] The Respondent had four persons on-site during the build in addition to himself. They were: three builders, one of whom was his son and one of whom was a late-stage apprentice. The Respondent stated the staff had worked with him for some time and that he was always on site when restricted building work was carried out.
- [22] The Respondent generally submitted that the building work was not complete and that matters would have been attended to prior to completion and that he was not able to as a result of a commercial dispute. He also noted issues with COVID 19. COVID restrictions and lockdowns occurred after the building work complained about was completed.

### Ground Floor Bearer

- [23] The issue under investigation was whether an existing ground floor bearer (shown below in the following photographs) was replaced as required to address dilapidation issues. The building consent issued required that all decayed timber be replaced in accordance with a surveyors instructions or in accordance with MBIE guidelines.



- [24] The evidence was that new building work had been carried out on top of the existing beam. The question was, from a sequencing perspective, why the new building work was carried out on top of it, rather than it being replaced before new framing was installed on top of it.
- [25] The Respondent stated that the patio seen in the photograph above was built against the beam and that the patio and scaffolding had to be removed prior to the beam being replaced. He also noted that issues with regard to water flowing underneath the house and other pre-existing issues that needed to be addressed.
- [26] When asked how he would have removed the beam and reinstated a new one, he stated he would have used temporary props to take the load and allow the removal.
- [27] The Complainant noted that the builder who took over from the Respondent was able to remove and replace the beam without removing the patio, and he questioned why the usual methodology of building from the ground up was not followed.

### Timber Remediation

- [28] The repairs and alterations were, in part, designed to deal with water-tightness issues. The building consent issued required that all decayed timber be replaced in accordance with a surveyor's instructions or in accordance with MBIE guidelines. Building work started in March 2018.

- [29] The engineer's Site Inspection Reports noted timber decay. Report No. 7 of 18 January 2019 noted:

*The External framing is now exposed.*

*Quite a lot of the framing is showing signs of decay.*

*Water has track along the members from the leaking gutters and the cladding.*

*Harry Conroy to get some advice on whether this is a serious problem.*

- [30] The next A Site Inspection Report (No.9 of 15 February 2019) noted:

*Met with Harry Conroy, [Omitted], [Omitted] the owner, [Omitted] and others on site*

*Purpose of the visit was to view and discuss the decayed timber framing for the house.*

*Harry had arranged for [Omitted] of [Omitted], A Building surveyor, to attend the meeting and advise when he could do to identify parts of the timber framing that needed to be either removed or attended to due to timber decay.*

*[Omitted] explained the process that he would follow if he was commissioned to carry out the surveyor.*

*After the meeting Harry Conroy and met with the owner to discuss the way forward.*

*Carried out a walk around the timber framing to illustrate what is likely to result from a more detailed inspection.*

- [31] Mr [Omitted], a building surveyor, was engaged by the homeowner on or about 6 June 2019 to carry out a dilapidation survey. Mr [Omitted] provided photographs taken by him at his site visits. A "Condition /To Do/ Action Schedule" report was produced by him on 2 July 2020. The report noted a significant number of issues relating to the compliance of the building work completed. It did not note any timber condition issues.

- [32] Site Inspection Report No. 10 of 18 September 2019 noted:

*The [Omitted], Building Surveyor. Had carried out an inspection of the timber framing for the house and marked up all areas which either needed to be replaced or the timber treated.*

*[Omitted] in consultation with the owner had decided that the most satisfactory way forward was to replace the timber tat had shown signs of decay.*

*The replacement of timber is progressing*

*The timber framing in the living room area has been replaced.*

- [33] Mr [Omitted] estimated he had completed five site visits but that he had not signed the work off. The photographs taken during his earliest visits show well-advanced building work. He noted that on his first visit, he asked for the cladding to be removed so that he could assess the underlying timber and that this was done by the second team of contractors appointed by the homeowner. The Respondent stated that the cladding was not removed as the homeowners were living in the dwelling. The Complainant noted that the area in question was not a living area.

#### Roof Structure

- [34] The original roof was a low pitch roof with internal butynol gutters and parapets that was assessed as being a water-tightness risk. The consented design utilised proprietary trusses to create a 10 degree roof pitch to the Level 2 roof and 5 degree pitch to the Level 1 roof. Instructions provided from Engineer in site inspection reports and additional details and emails. When bedroom 4 was deleted the existing level 1 structure over the garage was strengthened along with the structure over the living room. The Respondent decided to move away from level 2 trusses because the outer walls were not plumb or square which, he stated, would have meant that individually measured trusses would have had to be fabricated or significant on-site adjustment of the trusses would have had to be undertaken. The Respondent maintained that the truss manufacturer would not supply trusses. The Complainant produced an email from the truss manufacturer which noted that trusses could have to be supplied, but that a site measure would have been required.
- [35] The Respondent decided that on-site construction of a reinforced roof structure would be a better solution. The Respondent stated that prior to construction of the roof structure starting, he called Mr [Omitted], the engineer, to site to discuss a solution. The Respondent also stated that he informed the designer, Mr [Omitted] of the proposed change. The change meant that the level 2 roof was not re-pitched.
- [36] The Respondent, in his written response to the first complaint, stated:

*There was always agreement by the Architect, the owner and HNV to undertake the in situ work on the roof. As explained the state of the existing house and areas being uncovered dictated that approach. What the [Omitted] fail to mention, is that meetings were held, prior to the remedial work commencing.*

*I phoned the architect after having made contact with the truss fabricators who informed me that because of the undulations, frames being out of plumb and out of square on both ground floor and upper floor, they could not provide trusses with so many varying dimensions.*

*The conversation with the architect continued in the following days as to how and if, we could rebuild the in situ roof. We must state that the roof remediation was undertaken before the decision was made to replace all*

*framing timbers below. The decision to replace the majority of the timber framing was made after the first visit by the building surveyor and his assistant.*

- [37] Site Inspection Reports Numbers 6, 7, 10, 11 and 12 made reference to roof framing over the garage and the extended areas. There were no obvious references to the consented approach of trusses being changed to reinforcement of the existing level 2 roof structure within them.
- [38] The Board sought written site instructions from either the designer or the engineer in relation to the change to the consented level 2 roof structure. The Respondent stated he did have written instructions and was given an opportunity to produce them but did not. The engineer had vague recollections of discussions and thought he may have provided a sketch. The Complainant stated that he was not aware of any sketches being provided. The engineer was not sure if he had attended the site other than prior to work on the roof starting and could not recall if he had issued any site instructions. This contrasted with the engineer's earlier engagement, where 12 detailed site instructions were issued.
- [39] The upper level 2 roof structure as constructed by the Respondent was noted as having compliance issues by the new contractors that were appointed. A new engineer issued instructions for additional structural elements to be added to what the Respondent had constructed (installation of double joists to support the structure). The Respondent's position was that the work was not finished when he left the site. This was at variance with correspondence from the Respondent dated 23 July 2020, in which he stated:
- As the new roof structure is almost complete, amended drawings, both architectural and engineering, can then be submitted to the Council for approval prior to code compliance final inspection.*
- [40] Photographs provided by various witnesses of the state of the building work when the Respondent's involvement came to an end showed that the roof structure was substantially complete. This included photographs taken on 29 November 2019 by Mr [Omitted], which showed a substantially complete roof structure.
- [41] Evidence was also received that the Respondent constructed roof jack frames at 900 centres to create the falls on-site and that the second engineer had to issue instructions for them to be strengthened and prevent uplift and details on how to provide a load support path for the jack truss.
- [42] The Respondent was not able to answer questions on how he arrived at the design solution that he used to construct the roof. He was not able to advise how he dealt with changed load paths down through the levels to the foundations or what additional bracing would have been required or was installed to accommodate for the change to the construction methodology.

- [43] The Respondent accepted that the changes required specific engineering design and that a formal amendment to the building consent was required. The Council Inspectors present confirmed that an amendment was required. The Respondent accepted that an amendment had not been issued when he undertook the work. Both he and the designer took the approach of dealing with changes after the work had been completed and as part of a single change package. An email from Mr [Omitted] dated 26 February 2019 stated as much when he noted:

*We will also have to look at the roof as most of it will not be trusses any longer.*

*We'll try and keep any future amendments all in one package so that any council fees don't get paid at multiple times.*

*Our concern is that we need to be ahead of the inspectors so when they turn up on site they don't get surprised by any amended configurations and potentially hold things up. Also Harry needs to have updated drawings so he knows what to build.*

- [44] The Board was also provided with an email dated 3 December 2021 by the Complainant. It was from a truss manufacturer. It stated:

*As per our phone conversation, if we were supplying trusses a site measure would be required for an out of plumb wall situation. Each truss would need their own specific heel height to maintain a consistent pitch angle and have the apexes line up.*

- [45] Mr [Omitted] gave evidence that he had not provided any designs, drawings or instructions with respect to the changed roof structure. As noted, no evidence was provided of any engineering designs or instructions.

#### Weatherboards

- [46] A change was made to the manner in which weatherboards were completed at internal and external corners. The consented drawings provided for mitre corners to external corners and back flashings to internal corners. The Respondent also provisioned for box corners. The Respondent, after the completion of the hearing, provided an updated detail issued by the designer Mr [Omitted] for the inclusion of boxed corners. At the time the Respondent left site the box corners had not been installed. However, the majority of completed external corners had been fitted with corner soakers at this time.
- [47] The Respondent stated that, in order to provide for the fixing of box corners, multiple cavity battens were installed at corners. Photographs of the building work that had been completed by the Respondent showed multiple cavity battens that did not allow for water escape paths:



- [48] The above photograph showed building wrap from walls running under a purlin. The Respondent was asked how he would complete the roofing cladding. He stated he would lift the purlin and the paper prior to roofing being undertaken.
- [49] The Respondent also used a different flashing methodology at internal corners, which he stated was necessitated by the type of weatherboard supplied and used and because the consent details would not have worked. He stated he built a mock-up for the BCA to review based on detail provided by the manufacturer prior to carrying out the work. He provided a photograph of the mock-up. He stated he had specifications from the weatherboard supplier but they were not provided.
- [50] Photographs of cladding provided prior to the hearing appeared to show that WANZ bars and flashings for windows had not been installed. Photographs provided after the hearing showed that they had been installed.
- [51] The consented detail for cladding to window openings was not followed. The cladding was installed flush with the openings, whereas the consented design required a 20mm incursion into the window frame. Mr [Omitted] expressed an opinion that this was not an acceptable solution.
- [52] Incorrect fixings were used on weatherboards. The consent required stainless steel, whereas evidence received was that galvanised nails had, in some instances, been used. The Respondent could not explain this and stated that he would have addressed the issue if he had seen it.

## Record of Work

[53] The building work included restricted building work for which a record of work must be provided on completion. The Respondent started on the project on or about 18 March 2018. The Respondent's involvement in the building work came to an end on or about 29 September 2020, after which date other contractors continued on and completed the building work.

[54] In his initial response to the first complaint, the Respondent stated:

*As stated in previous correspondence to the [Omitted] and their lawyer, any disagreement with the contract had to be through mediation when the dispute first began. There was a reluctance by the [Omitted] to participate.*

*We state that an offer of mediation was suggested by the [Omitted] approximately 7 months later on the 13th of September and two weeks before their illegal cancellation of the contract. refer our letter dated 14 October 2020.*

*We revoked their cancellation of the contract, as the reasons they used were contrived. refer our letter dated 14 October 2020*

*We reiterate that there was no clause in the contract for cancellation or even termination.*

*We do not believe we need to supply a record of work as our endeavour to complete the project continued to be undermined.*

[55] A letter from [Omitted]s to owners dated 23 July 2020, refuted the suspension of the building work by the owners.

[56] The Respondent had not, at the time the hearing occurred, provided a record of work for the Restricted Building work he carried out or supervised between 18 March 2018 and 29 September 2020.

[57] The Respondent submitted, at the hearing, that, as he was not able to complete the building work, he could not provide a record of work. The Respondent considered that he could have returned to carry out further restricted building work.

## **Board's Conclusion and Reasoning**

[58] 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) 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); and

(d) breached section 314B(b) of the Act (s 317(1)(h) of the Act)

and **should** be disciplined.

[59] The Board's findings under section 317(1)(b), 317(1)(d) and 317(1)(h) related to the manner in which the roof structure was built. The Board decided, as regards the other allegations, they were either not proven or were not serious enough to warrant a disciplinary finding.

[60] The Board has also decided that the Respondent **has not** carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act).

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

#### Negligence

[62] The Board made a finding of negligence, not incompetence. The negligent conduct was the failure to seek and obtain engineering designs for the reinforcement of the existing roof structure prior to him carrying out the associated building work.

[63] With regard to the remaining allegations, the Board decided:

#### *Ground Floor Bearer*

[64] The Board decided that whilst it may have been more logical, from a building sequence perspective, to replace the ground floor bearer prior to framing being constructed above it, the plate was able to be removed and replaced without the need for deconstruction. As such, the Board decided that the allegation was not serious enough.

[65] With regard to seriousness, in *Collie v Nursing Council of New Zealand*,<sup>8</sup> the Court noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[66] It is on this basis that the Board made its finding that the conduct did not warrant disciplinary action.

#### *Timber Remediation*

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<sup>8</sup> [2001] NZAR 74

- [67] The engineer's Site Inspection Reports indicate that timber remediation was being dealt with in an appropriate manner. The surveyor's dilapidation report, which came after the Site Inspection Reports, did not note any timber condition issues. As such, the allegation is not upheld on the basis that there is no evidence of negligence or incompetence with respect to the issue.

#### *Weatherboards*

- [68] There were multiple issues that were investigated. With regard to a change to use box corners, the Board finds that this was appropriately dealt with as the designer had issued an updated detail for it. The same applies to the flashing change that was to be used at corner junctions and the change to the cladding being installed flush at windows, which Mr [Omitted] stated was acceptable. The Board does note, however, that the Respondent should have used a minor variation process for both and that the minor variation should have been processed prior to work being carried out.
- [69] The multiple cavity battens at corners were not in accordance with the building consent and were noted as having the potential to prevent water escaping within the cavity. The Respondent stated that the extra battens were to provide fixing for box corners. Whilst the Board did not accept that extra battens for fixing was required, the Board decided that the matter was not serious enough to make a disciplinary finding.
- [70] In terms of the wrap under the purlin, the Board accepted that it would have easily been remediated as the work progressed and, as such, it was also not a serious enough issue. The same applied to the incorrect fixings.

#### *Roof Structure*

- [71] As noted, the finding of negligence (not incompetence) relates to the roof structure. Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>9</sup> Judge McElrea noted:

*[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

- [72] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*<sup>10</sup> test of negligence which has been adopted by the New Zealand Courts<sup>11</sup>.

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<sup>9</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>10</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

- [73] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*,<sup>12</sup> it was stated as "*an inability to do the job*".
- [74] The Board decided that the Respondent knew that a specific engineered design was required but chose to proceed without one.
- [75] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>13</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [76] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>14</sup>. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>15</sup>.
- [77] The Board notes that the purposes of the Act are:

### **3 Purposes**

*This Act has the following purposes:*

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

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<sup>12</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>13</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>14</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>15</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[78] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>16</sup> and be carried out in accordance with a building consent<sup>17</sup>. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[79] Turning to seriousness in *Collie v Nursing Council of New Zealand*,<sup>18</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[80] Looking at the roofing structure, the Respondent made a decision to change the construction methodology. The change required an amendment to the building consent. One was not sought. That is an issue that will be dealt with under section 317(1)(d) of the Act (building contrary to a building consent).

[81] The change also required a specific engineered design. The Respondent was not qualified nor licensed to develop a specific engineered design. There was no evidence that one was not sought or provided by an engineer who, prior to then, had been integrally involved and had issued 12 Site Inspection Reports. Those reports did not provide instructions on how the roof was to be reinforced. Nor did they show any evidence of the work being reviewed by the engineer.

[82] The Respondent stated he had conversations with the engineer and designer. Conversations do not suffice. A specific engineered design needs to be in writing and obtained prior to work being carried out, not after. It ensures that the building work, which falls outside of an acceptable solution such as that provided for in NZS3604, meets Building Code requirements and will achieve the purposes of the Act.

[83] The change in methodology also meant that a change in pitch to the roof, which was intended to assist in dealing with water-tightness issues, was not achieved. The new engineer involved in the building work expressed an opinion that there were issues with how the Respondent went about reinforcing the existing roof. An amendment was lodged on 25 September 2020. It included detailed drawing, details, calculations and a new design producer statement (PS1) from the new engineer.

[84] The Board did not accept the Respondent's position that the building work was not complete. The evidence, including correspondence from the Respondent, showed that it was substantially complete, and the key point in the Board's finding is that it should not have started without a specific engineered design and a building consent amendment having been granted.

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<sup>16</sup> Section 17 of the Building Act 2004

<sup>17</sup> Section 40(1) of the Building Act 2004

<sup>18</sup> [2001] NZAR 74

- [85] The Board, in making its decision, also noted that there was an inconsistency in the Respondent's reasoning as to why he did not use trusses. Whilst he noted that the reason was that the frames were not true, he also noted that he had removed and replaced most of the framing. As such, the reason for not using trusses was, in itself, being remediated. Had the Respondent consulted the designer and the engineer in a full and appropriate manner, alternative solutions might have been arrived at, which allowed for the use of trusses, as originally intended.
- [86] Given the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

#### Contrary to a Building Consent – Building Consent Changes

[87] Under section 17 of the Act all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).

[88] All building work must also be carried out in accordance with a building consent. Section 40 of the Act provides:

**40 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

[89] Building consents are granted under section 49 of the Act. A building consent can only be granted if the provisions of the Building Code will be satisfied. Section 49 provides:

**49 Grant of building consent**

- (1) *A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[90] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In

doing so, the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out above.

- [91] In *Tan v Auckland Council*<sup>19</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.*

- [92] 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 persons and property at risk of harm.

- [93] Justice Brewer in *Tan* also noted:

*[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*

*[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*

- [94] The *Tan* case related to the prosecution of the project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.

- [95] Once a building consent has been granted, any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

- [96] In this respect, section 45(4) of the Act states:

- (4) *An application for an amendment to a building consent must,—*
- (a) *in the case of a minor variation, be made in accordance with section 45A; and*
  - (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

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<sup>19</sup> [2015] NZHC 3299 [18 December 2015]

- [97] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.
- [98] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building consent or an exemption, it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:
- 96**     ***Territorial authority may issue certificate of acceptance in certain circumstances***
- (3)     *This section—*
- (a)     *does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and*
- (b)     *accordingly, does not relieve a person from the requirement to obtain a building consent for building work.*

[99] The Respondent accepted that an amendment to the building consent was required. The witnesses from the Council confirmed this was the case. The correspondence provided to the Board confirmed the same. The stated intention, however, was to deal with the amendment after the building work had been completed. That is not the required, nor appropriate, course of action. The Act requires that the amendment be applied for and granted prior to the building work being carried out. As that did not occur, the building work carried out by the Respondent was, in essence, still to be carried out under the consent that had been issued. It was clearly not in accordance with it as it required trusses. It follows that the disciplinary offence has been committed.

#### Record of Work

- [100] There is a statutory requirement under section 88(1) of the Building Act 2004 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>20</sup>.
- [101] Failing to provide a record of work is a ground for discipline under section 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.
- [102] The Board discussed issues with regard to records of work in its decision C2-01170<sup>21</sup> and gave guidelines to the profession as to who must provide a record of work, what

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<sup>20</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>21</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [103] 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). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [104] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work ...". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*<sup>22</sup> "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".
- [105] As to when completion will have occurred is a question of fact in each case. 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.
- [106] In this instance, the building work came to a premature end. The owners suspended the building work and then terminated the Respondent's involvement. The Respondent did not accept that. He stated an intention to return and complete further work. That, however, would not have been possible as a new contractor had been engaged and continued the work after 29 September 2020. The Respondent was aware of that.
- [107] Given those circumstances, the Respondent's involvement in the building work had come to an end, regardless of his stated intentions. He was not able to return and carry out any further restricted building work. Completion, for the purposes of the provision of a record of work, had, therefore, occurred. A record of work has not been provided. This remains the case, even though a complaint about the non-provision of a record of work has been made. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [108] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced 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.

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<sup>22</sup> [2018] NZHC 1662 at para 50

- [109] In this instance, there was an ongoing dispute. Whilst not referred to as a good reason, the Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [110] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Outside of Competence – Design Work

- [111] The Board's notice of proceeding contained two charges, carrying out design work which is restricted building work that he was not licensed to carry out contrary to section 317(1)(c) of the Act and carrying out building work that he was not competent to carry out contrary to sections 317(1)(h) and 314B(b) of the Act. Both related to the roof structure, and the changes to the design that took place. The Board decided that, as the Respondent did not develop or submit a specific design, that the charge under section 317(1)(h) of the Act was the more appropriate of the two.
- [112] Section 314B(b) of the Act provides:
- A licensed building practitioner must—*
- (b) carry out or supervise building work only within his or her competence.*
- [113] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b), a Licensed Building Practitioner must only work within their individual competence. In this respect, it should be noted that if they hold a class of license for the building work they are undertaking but are not able to successfully or efficiently complete the building work, then it may be that they are working outside of their competence.
- [114] The Respondent holds a Carpentry Licence. He does not hold a Design Licence. Licensing classes are designated under section 285 of the Act. The current ones were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a Licensed Building Practitioner can carry out or supervise. Under clause 4 of the Order, the following are the types of building work each class of licence can carry out:

<b><i>Licensing class</i></b>	<b><i>Type of building work</i></b>
<i>General Licence Classes</i>	
Design	Design work for any building that is— (a) a category 1 building; or (b) a category 2 building; or

**Licensing class**

**Type of building work**

(c) a category 3 building

*Trade licensing classes*

*Carpentry*

*Carpentry for any building that is—*

*(a) a category 1 building; or*

*(b) a category 2 building; or*

*(c) a category 3 building*

[115] On the basis of the above, a licensed building practitioner with either a Carpentry Licence cannot carry out or supervise restricted building work that is design work. Design work was included in the definition of building work by the Building (Design Work Declared to be Building Work) Order 2007, which declared:

**3 Design work declared to be building work**

(1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*

(2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

[116] The Respondent, when he changed the consented design for the roof structure, did not use any form of an acceptable solution.<sup>23</sup> Acceptable solutions are a means of establishing compliance with the Building Code. As such, the Respondent has, in essence, developed the solution. He did not satisfy the Board that he had the training, qualifications or experience to do such work. The fact that issues were identified with his solution by an engineer is evidence of that lack of competence. As such, notwithstanding the Respondent pointing to a long and varied career in building, the Board finds that the Respondent did work outside of his personal competence in developing the structural solutions for the roof structure.

**Penalty, Costs and Publication**

[117] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[118] 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.

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<sup>23</sup> Acceptable solutions are provided for in section 22 of the Act.

## Penalty

[119] 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*<sup>24</sup> 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.*

[120] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>25</sup> 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 do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[121] The matters before the Board were serious. The Respondent redesigned the roof restructure without first obtaining the required professional input and without obtaining a building consent amendment. He has compromised the building consent. A certificate of acceptance will have to be sought for the unconsented work. A certificate of acceptance can carry a stigma. The Respondent proceeded in the manner that he did notwithstanding his stated long and varied experience in the building industry. The Respondent has also failed to provide a record of work.

[122] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>26</sup> the High Court, in relation to penalty in a case about a legal practitioner, stated:

*[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term.*

[123] The Board, on the basis of the above commentary, initially considered suspending the Respondent's licence. However, given the mitigating circumstances present, the Board decided that suspension was not required. Those mitigating circumstances were the involvement of the engineer and designer and their failures to advise that a building consent amendment was required prior to any building work being undertaken. They ought to have known better and, in essence, contributed to the overall situation.

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<sup>24</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>25</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>26</sup> [2011] 3 NZLR 850

- [124] Taking all of the factors into account, the Board decided that a mid-level fine would be appropriate. It has set the amount at \$3,500, an amount which it hopes will deter the Respondent and others from similar conduct.

### Costs

- [125] 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."
- [126] 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<sup>27</sup>.
- [127] In *Collie v Nursing Council of New Zealand*,<sup>28</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.*

- [128] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>29</sup> the High Court noted:

*[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*

*[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*

- [129] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was complex. Adjustments based on the High Court decisions above are then made.
- [130] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. The amount is

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<sup>27</sup> *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.

<sup>28</sup> [2001] NZAR 74

<sup>29</sup> CIV-2011-485-000227 8 August 2011

the Board's scale amount for a half-day hearing. It is significantly less than 50% of actual costs.

### Publication

[131] 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<sup>30</sup>. 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.*

[132] 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.

[133] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990<sup>31</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>32</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>33</sup>. 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*<sup>34</sup>.

[134] 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>35</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.

[135] Based on the above, the Board will order further publication. The Board considers publication is required to ensure that others learn from the matters that were before the Board. An article in The Wrap-up will be published summarising the matter.

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<sup>30</sup> Refer sections 298, 299 and 301 of the Act

<sup>31</sup> Section 14 of the Act

<sup>32</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>33</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>34</sup> *ibid*

<sup>35</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

**In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.**

[137] 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

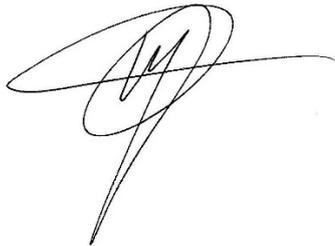
[138] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on Wednesday 23 February 2022. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If 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.

[139] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

## Right of Appeal

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

Signed and dated this 31<sup>st</sup> day of January 2022.



**Mr M 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).*
- (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."*

### <sup>ii</sup> **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.*