

Before the Building Practitioners Board

	BPB Complaint No. CB25653
Licensed Building Practitioner:	Alexander Cooper (the Respondent)
Licence Number:	BP 132498
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Location	Whangarei
Hearing Type:	In Person
Hearing Date:	30 June 2021
Decision Date:	2 August 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1

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 a disciplinary offence under section 317(1)(b) of the Act.

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Summary of the Board's Decision

- [1] The Respondent has negligently supervised building work. His licence is suspended for a period of 12 months. He is ordered to pay costs of \$3,500.

The Charges

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary 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 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.
- [3] The Board gave notice that, in further investigating the above allegations, the Board's inquiries and the hearing would focus on the roofing report provided by Mr Henry Cooper, and the issues noted and raised in an email dated 26 June 2020 from Mr Brian Cook, which outlined issues noted.

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

[4] 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.

[5] 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.”

[6] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

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

[7] 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.

[8] 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

[9] 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

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

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.

- [10] 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.

Evidence

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

- [12] 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.

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

Alexander Cooper	Respondent
Gavin Cooper	Witness and father of the Respondent
[Omitted]	Complainant
[Omitted]	Complainant
Henry Cooper	Witness, Xpert Roofing and Construction (not related)
Brian Cook	Building Control Officer, Whangarei District Council

- [14] The issues out lined in the complaint that the Board further investigated at the hearing were (as numbered and stated in the complaint):

6. *Ridging on shed is riveted not screwed as per plans*
7. *Ridging on gable of roof is dented*
8. *Sill flashings are uneven window flashings have been done 3 times now.*

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

9. *Window jams damaged due to installation*
10. *Windows not installed correctly. No 5mm gap at the bottom, unevenly installed, no 10mm allowance inside for gib. Sealing foam tape poorly installed, some is sticking out others are pushed right in, some windows have less than 4mm clearance on the inside.*
11. *Front wall laps of iron still not right*
12. *Flashings missing from roof*
13. *Corner flashings on shed missing*
14. *Spouting installed incorrectly with not enough fall*
15. *Plywood wall not installed correctly and had to be removed, has not been put back up*
16. *Plywood not installed on laundry*
17. *Building wrap not installed in ceiling between dwelling and shed*
18. *Meter box not installed and flashed in*
19. *Iron on shed was to be redone and cut correctly, this was asked to be done 3 times, it was eventually done but is still not right. To remedy this stuff up they were supposed to put a header flashing on. This has not been done.*
20. *Gaps on front wall at the bottom uneven not fixed*
21. *Horizontal base flashings did not have the flashing sloping down to shed moisture, this will need to be remediated no evidence to say this has been fixed*
23. *Roofing issue still no information regarding the so-called insurance claim and what it is for. Claiming against workmanship or manufacturer issue when I have confirmation from Steel and Tube that there is no manufacturer fault have also spoken to NZ Steel and they have been completely unaware of any claim or warranty issues also has no record of Tony sending photos to NZ Steel like his email states.*
24. *Roofing photos show a lot of damage to the roof and is meant to be brand new. It is covered in scratches, dents and was covered in swarf but apparently Alex was able to clean that off when someone else was not able to even scratch it off.*
25. *Cuts around head flashings are horrible, filled with silicon and covered with black foam tape that is not at all hidden by flashing.*

26. *Head flashing that appears to be extremely long when perhaps does not need to be looks terrible*
27. *Shed flashings are not 50mm below the concrete* 28. *Fascia was not painted we had to request it be painted which meant they had to take the spouting down and start again. Once spouting was up, they did not touch up the paint work where it has been scratched.*

- [15] In addition, the Board was provided with a report from Mr Henry Cooper of Xpert Roofing, which gave a detailed overview of the roofing issues and a file note from a site meeting attended by Mr Brain Cook from the Whangarei District Council dated 25 June 2020, and a failed site inspections dated 2 June 2020 and 4 June 2020.
- [16] The building work consisted of two parts: one, a conventional residential dwelling, and two, what was described as a MiTek pole shed, which contained a toilet, laundry, and workshop space.
- [17] The residential dwelling and the MiTek pole shed shared a common floor slab, a common wall between them, a door connecting the two and common roof apron flashings and cladding junctions.
- [18] Mr Henry Cooper confirmed his report and answered questions from the Board. It was his opinion that there were significant issues as described in his report with the metal roofing and cladding as well as the installation of the windows and associated flashings.
- [19] While Mr Henry Cooper undertook the remedial work, the Board found him to be a credible witness.
- [20] Mr Cooper's report indicated that the roofing and cladding needed to be replaced.
- [21] The Respondent argued that the two buildings were separate and that, accordingly, the MiTek pole shed was a separate building which was, on the building consent plans, separated by a 20mm gap. He submitted that the building work on the MiTek pole shed did not involve restricted building work (RBW), and construction of the MiTek shed was to a standard of finish you would expect of a standalone shed.
- [22] In his written evidence and reiterated in an email to the Ministry of Business and Innovation and Employment (MBIE) dated 23 June 2021, the Respondent stated:

Hi there, just in response to the latest report. I'm wanting to reiterate that the dwelling at [Omitted] has a MiTek pole farm building as part of the build. This is a IL1 building and not restricted building work which does not require a LBP. G and A constructions leading hand led the team in this aspect of the build, leaving me to concentrate on the restricted building work aspects of the build. In this regard I had no involvement in the construction of the MiTek pole farm building. Evidence relating to the MiTek pole farm building is irrelevant to these proceedings including the framing, roofing and cladding

on this build. As this MiTek pole farm building is a IL1 structure and not restricted building work and NOT constructed by me.

- [23] At the hearing, while the Respondent was still of the view that the MiTek pole shed was not RBW, he did, however, accept that he was supervising the leading hand who was undertaking the bulk of the work on the shed. The leading hand did not have a carpentry licence.
- [24] Mr Cook (WDC) confirmed there was only one building consent for the residential dwelling and that it included the pole shed. He confirmed that the residential dwelling was considered to be a high, IL2⁷ risk building and did contain RBW, but that that the MiTek pole shed was considered a low, IL1⁸ risk building and was not considered by the Council to be RBW.
- [25] There was a second report by Mr Henry Cooper dated 21 June 2021, which was completed while undertaking remedial work. He noted further issues which were brought to light being:

Upon removing the damaged iron from the roof on the Shed we found the following issues:

- *Guttering was not sealed correctly, had swarf build up and insufficient rivets to hold the joins.*
- *Ridge flashing wasn't sealed and joined properly, and flash guard not dressed into corrugations.*
- *Installed split sheet roughly and didn't measure barge flashing correctly to fit. Which left gaps where roofing is supposed to overlap nicely and was not sealed.*
- *Netting was loose and poorly installed. There were large staples all the way along the edges which caused issues when screwing the iron on, the screws hit the staples causing them to deflect and enter on an angle which caused rubber seals to split and break causing screws to not seal to the roof properly.*
- *Due to poor alignment trusses are warped.*
- *South wall of the shed was so warped we had to use a strop between the trusses and attach to scaffold to pull it straight enough for us to install the new iron correctly.*
- *Ridge line – the ridge cap had been installed using rivets in a high wind zone. This needed to be replaced and screwed to the purlins, however we found that the framing was in fact too wide for the ridge cap, therefore*

⁷ Clause A3 of the Building Code provides for levels of importance. IL2 or level of importance 2 is defined as: Normal structures and structures not covered by other categories, such as timber-framed houses, car parking buildings or office buildings.

⁸ IL1 or level of importance 1 is defined as: Structures presenting a low degree of hazard to life or property, such as walkways, outbuildings, fences and walls.

additional wood was required to be installed for the ridging to be installed correctly.

- *Barge boards were poorly installed and warped; these were required to be straightened which was done but the new builders.*

Issues found on the house roof and cladding:

- *Gaps between flashing and iron where the shed wall meets the house.*
- *Roof purlins were not fixed correctly. There is a requirement for 1 blue screw and 1 nail. Some of the purlins had no fixings at all and could be moved by hand.*
- *Flashing around lounge vertical window had large gaps at the bottom where there was no flashing, which would have cause water ingress.*
- *Walls on the house are not straight, as an LBP this should have been checked prior to installation of the iron. This has caused the iron to not sit plum in some places.*
- *All windows and door flashings on the house were installed extremely poorly and were probably the worst I've ever seen.*

[26] As a general position, the Respondent accepted that there were some issues with the work but that in the case of the MiTek pole shed. He was of the opinion that the standard of work was acceptable. He went onto say that in some cases, the work had not been completed or, in the case of some of the roofing work, had been done to temporarily fix parts of the roof to provide some weather-tightness during the COVID lockdown.

[27] In respect to the building work not being done in accordance with the Building consent, with the exception of the use of untreated plywood on the external side of the Southern dwelling, the Board was not provided with any further evidence in relation to the allegation. .

Board's Conclusion and Reasoning

[28] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and **should** be disciplined.

[29] The Board has also 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).

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

Negligence

[31] The finding of negligence relates to the Respondent's supervision of non-licensed persons.

- [32] 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*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.
- [33] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹¹. 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.
- [34] 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 Act¹². 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 practitioner¹³.
- [35] 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.*

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

¹² *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- [36] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁴ and be carried out in accordance with a building consent¹⁵. 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.
- [37] The evidence before the Board was that there were multiple failed inspections, and the Board was provided with comprehensive reports showing numerous significant quality and compliance issues. It was also noted that non-compliance issues were not addressed in a timely manner.
- [38] The Building Consent Authority's role is to check that the building work has been carried out in accordance with the building consent. It is somewhat inevitable that a building consent authority will identify compliance issues that require remediation. It will not always follow that a licensed building practitioner will be negligent because they issue failed inspections. What needs to be considered by the Board are factors such as:
- (a) whether there is any form of system or process to identify quality and/or compliance issues;
 - (b) the extent and seriousness of the non-compliance;
 - (c) whether there is a pattern of continued non-compliance; and
 - (d) what steps are taken when non-compliance issues are raised.
- [39] The Board considers that licensed building practitioners should be aiming to get building work right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. Moreover, when compliance failings are identified, the Board would expect prompt action to be taken and that they would not repeat the same failings. In this respect, during the first reading of changes to the Act around licensing,¹⁶ it was noted by the responsible Minister:
- In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*
- [40] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁷:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ Hansard volume 669: Page 16053

¹⁷ Hansard volume 669: Page 16053

to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [41] Section 3 of the Act, which sets out the Act's purposes, notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

14E Responsibilities of builder

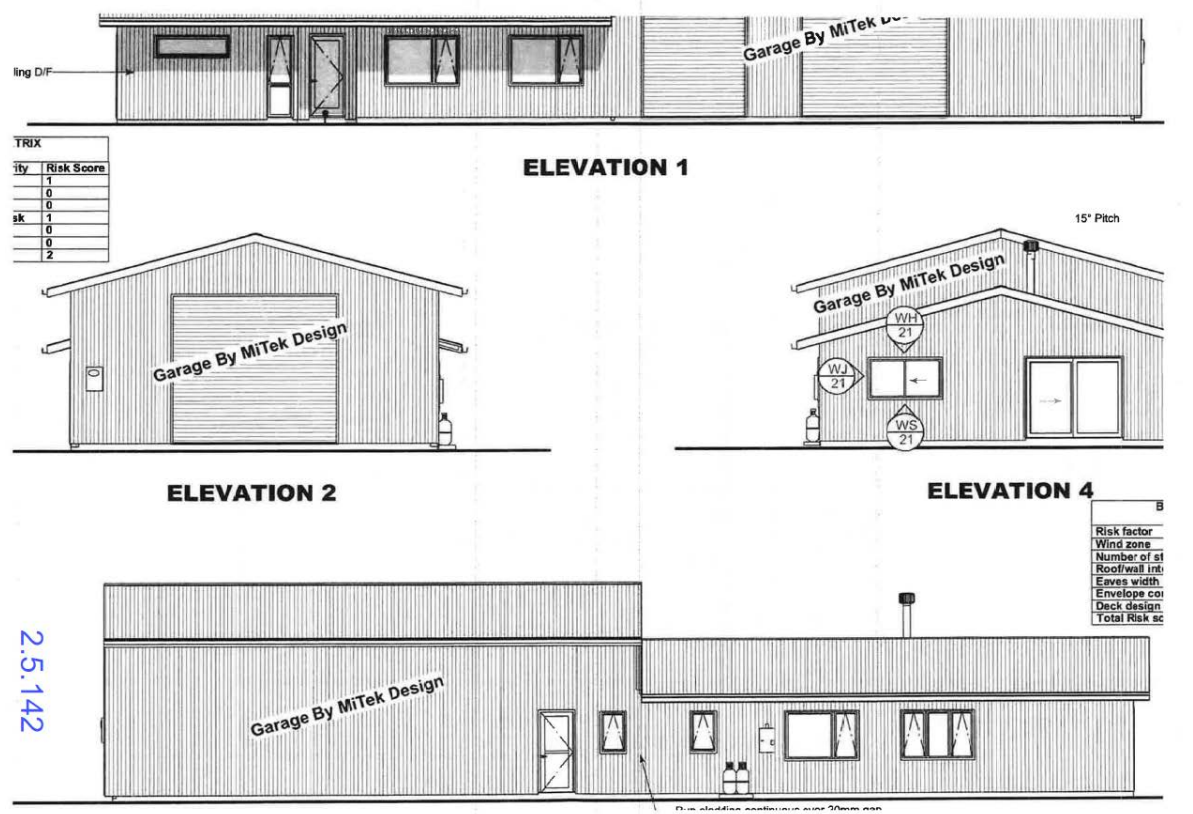
- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
 - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates;*
 - (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
 - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act;*
and
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

- [42] It is within this context that the Board considers that the acceptable standards expected of a reasonable licensed building practitioner includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out and that if there are issues that they will be dealt with and learnt from.

- [43] The Respondent submitted that the building work was not restricted building work. The disciplinary charge under consideration is with respect to "building work", not "restricted building work". Other disciplinary charges are limited to restricted

building work. As Parliament has seen fit to distinguish between the two in the various charges available under section 317 of the Act, it is clear that Parliament intended that the Board have disciplinary jurisdiction over Licensed Building Practitioners for the conduct as it relates to both building work and restricted building work. Put another way; the distinction does not restrict the Board from considering the Respondent's conduct.

- [44] Putting that aside, it was clear to the Board that the construction of the two parts was such that they were designed to look and function as if they were one single dwelling. The elevations from the building consent below graphically demonstrate this:



- [45] The two parts shared a common wall. If the two buildings had been separated as stated, then they both should have and would have, had separate cladding. This was clearly not the case, nor was it feasible nor, in the Board's view intended, when construction was undertaken given the very close proximity. There was a common slab between the two. There was an internal door connecting the two. The Mitek part of the dwelling contained a laundry, toilet and shared common drainage.
- [46] To all intense and purposes, the project was being constructed as if it were one building, and the Board finds the expectation was of a standard of finish expected of a residential dwelling.

- [47] It should also be noted that, even if a Licensed Building Practitioner is carrying out building work on an IL1 building, the Building Code still and minimum standards still apply.
- [48] The evidence presented showed a lack of attention to detail and, as outlined in the Henry Cooper report, workmanship that fell well short of the standards expected of a competent Licensed Builder Practitioner.
- [49] This was especially the case in respect of the MiTeck part of the building work. While the bulk of this work was undertaken by the Respondent's leading hand, the Respondent accepted, at the hearing, that he was responsible for supervising him. That is also the law.
- [50] Supervise is defined in section 7¹⁸ of the Act. The definition states:
- supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*
- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*
- [51] In C2-01143, the Board also discussed the levels of supervision it considers would 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.
- [52] The Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [53] 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 1992¹⁹. The definition of supervision in that Act is consistent with the definition in the Building

¹⁸ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) *is performed competently; and*

(b) *complies with the building consent under which it is carried out.*

¹⁹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Act, and as such, the comments of the Court are instructive. In the case, Judge Tompkins stated at paragraph 24:

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

- [54] As described above, the Respondent was the person who undertook and supervised the building work for the whole project.
- [55] It was clear to the Board that there was a serious lack of supervision of the leading hand who undertook the building work and especially that associated with the MiTek part. There were significant faults identified in the Henry Cooper report and in the failed Council inspections.
- [56] The Respondent, in his written evidence, stated, “I let the leading hand get on with it” and, as a result, the building work was poorly done and did not reflect the fact that, notwithstanding this was a MiTek pole shed, it was to form part of one structure and was to look like one building.
- [57] Even if it had been a standalone shed the standard of workmanship was poor and below that to be expected of a Licensed Building Practitioner.
- [58] The Respondent did not provide the level of supervision needed to make sure the leading hand carried out the build to the standard required for a residential building, nor of an IL1 building.
- [59] 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

- [60] Under section 40 of the Act, all building work must be carried out in accordance with the building consent issued.
- [61] 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.

- [62] Whilst the building consent had not been strictly complied with, the Board decided that as it has made a finding of negligence, a further finding of building contrary to a building consent was not required.

Penalty, Costs and Publication

- [63] 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.
- [64] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [65] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*²⁰ commented on the role of “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.

- [66] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*²¹. The High Court, when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner’s conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner’s offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner’s decision to

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

²¹ [2012] NZAR 481

knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [67] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [68] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*²², the High Court, in relation to the principles relating to suspension of a legal practitioner's licence, 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. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.

- [69] This was affirmed in *Jefferies v National Standards Committee*,²³ where the High Court also stated:

[25] I accept the principle that suspension is not intended to be a punitive sanction even if it invariably has that effect.

*[26] And I accept also that this means mitigating personal circumstances, though still relevant, are less closely connected to this purpose than would be the case in criminal sentencing. They will therefore carry less weight.*²⁴

- [70] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁵ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [71] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to the safe and healthy

²² [2011] 3 NZLR 850

²³ [2017] NZHC 1824

²⁴ *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492-493

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

functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.

- [72] Taking all of the above factors into account, the Board considers that a suspension of the Respondent's licence is not only warranted but also required to deter others from such conduct
- [73] Based on the above, the Board did consider the cancellation of the Respondents licence but was of the opinion that in this case, the poor workmanship was not a case of a lack of competency but one of negligence. As such, the Board's penalty decision is that the Respondent's licence is to be suspended, rather than cancelled, for a period of 12 months.

Costs

- [74] 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."
- [75] 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 case²⁶.
- [76] In *Collie v Nursing Council of New Zealand*,²⁷ 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.

- [77] 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. This is the Board's scale amount of costs for a half-day hearing and is substantially less than 50% of actual costs.

Publication

- [78] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act²⁸. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

²⁶ *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.

²⁷ [2001] NZAR 74

²⁸ Refer sections 298, 299 and 301 of the Act

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.

- [79] 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.
- [80] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³¹. 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*³².
- [81] 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 interest³³. 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.
- [82] Based on the above, the Board will not order further publication.

Section 318 Order

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

Penalty:	Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of twelve [12] months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners.
Costs:	Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
Publication:	The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(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.

²⁹ Section 14 of the Act

³⁰ Refer sections 200 and 202 of the Criminal Procedure Act

³¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³² *ibid*

³³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [84] 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

- [85] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **15 September 2021**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.
- [86] 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

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

Signed and dated this 25th day of September 2021


Mr C Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (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.*