

Before the Building Practitioners Board

	BPB Complaint No. CB25588
Licensed Building Practitioner:	Hardik Devani (the Respondent)
Licence Number:	BP 135747
Licence(s) Held:	Design AoP 2

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

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	26 January 2021
Decision Date:	2 February 2021

Board Members Present:

Mr M Orange, Deputy Chair, Legal Member (Presiding)
Mr R Dunlop, Retired Professional Engineer
Mrs F Pearson-Green, LBP, Design AOP 2
Mr F Thomas, LBP, Roofing, Registered Plumber

Appearances:

Janine Badenhorst for the Respondent

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 been negligent and incompetent in his supervision of design work carried out by non-licensed persons. His Design AoP 2 licence is restricted to carrying out and supervising Category 1 Buildings until such time as he satisfies the Registrar that he is competent to carry out and supervise design work on Category 2 Buildings.

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

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

hearing in relation to building work (design work) at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have carried out design work for an alteration in manner that did not meet acceptable standards in that the Respondent may have failed, in his design work:

- (a) to take into consideration from a design and resource consent perspective that a second attached dwelling was being created; and
- (b) to correctly calculate and apply the E2/AS1 risk matrix and to provide adequate detailing to specific the construction junctions and details for altering and adding onto the existing structure;
- (c) complete an H1 calculation for the new habitable arrears created;
- (d) to correctly apply the requirements of clause D of the Building Code as regards safe access with regard to headspace for stairs and tread rises;
- (e) to correctly apply the requirements of clause F4 of the Building Code safety from falling as regards internal and external balustrades;
- (f) to provision for the drainage connection for a new strip drain; and
- (g) to provide adequate supporting building consent documentation.

Function of Disciplinary Action

[3] 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.

[4] 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.”

[5] 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

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

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.

- [6] 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.
- [7] 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

- [8] 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.
- [9] 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

- [10] 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 which allow it to receive evidence that may not be admissible in a court of law.
- [11] 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.

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

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

- [12] In addition to the documentary evidence before the Board it heard evidence at the hearing from the Respondent who also filed a Further Statement in Response together with Annexures prior to the hearing. The Complainant did not attend the hearing. The Respondent was granted leave to file further evidence following the completion of the hearing which he did.
- [13] The Respondent was licensed in Design with an Area of Practice of Design 2 on 4 July 2019. At or about the same time, the Respondent started working for the Complainant's engineering consultancy business, [Omitted], on 19 June 2019 prior to him becoming licensed on 4 July 2019. The Respondent had previously worked for a design practice under supervision.
- [14] The employment with [Omitted] was on the basis that the Respondent would develop a building design practice for [Omitted]. The Respondent gave evidence that the employment relationship was entered into on the understanding that he would eventually obtain a shareholding in [Omitted] but that the offer did not transpire and that, as a result, the employment relationship came to an end. A dispute about the completion of the design work that was underway and the costs of the same ensued. The Complainant lodged a complaint with the Board about the Respondent's design work at multiple properties following the termination of the employment. The Board resolved to further investigate the design work in respect of one of those properties. Of the properties complained about it was the most complex design and the only one that was a Category 2 Building under the Schedule to the Building (Designation of Building Work Licensing Classes) Order 2010 requiring a Design AoP 2 Licence.
- [15] The Respondent has, since the termination, established his own design practice. He employs a number of staff in the practice.
- [16] The Respondent gave evidence that the design brief in respect of the one property that the Board did decide to further investigate was to convert an existing double garage into a habitable space to accommodate for a growing family. The design work had been started when the Respondent was with his former employer but by the Respondent. The job was transferred to [Omitted] when the Respondent changed employment.
- [17] The Respondent gave evidence that he engaged directly with the client to obtain instructions. A staff member carried out approximately 90% of the documentation under the Respondent's supervision. The Respondent was the only Design Licensed Building Practitioner on the staff at [Omitted]. The Respondent signed and submitted the Certificate of Design Work as part of the building consent application. The certificate stated the restricted building work complied with the Building Code. It did not record any waivers or modifications to the Building Code.

Second Dwelling

- [18] The Respondent gave evidence that he contacted the Council helpline after lodging the building consent application as there was some confusion about whether the

garage conversion would create a second dwelling. He did not take any notes of the conversation or obtain any confirmation of the advice, which was that the intended building work would not create a second dwelling. The Respondent made inquiries with the Council after the hearing to ascertain if it held any recordings of the inquiry. The Council advised that they did not.

- [19] The Respondent did refer to correspondence with the Council as part of the Request for Information (RFI) process and, in particular, a letter dated 23 September 2019 from the Council which noted a “self contained-unit” would have to comply with Building Code requirements. The Respondent submitted an amended plan with the kitchen removed. The building consent was granted on 21 October 2019 without Building Code requirements for a “self contained-unit” having to be complied with.
- [20] The Respondent submitted that the change of use provisions in regulation 5 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 had not been met and that, as such, design considerations for a second dwelling did not have to be taken into account.

Risk Matrix

- [21] The Risk Matrix⁷ calculation submitted as part of the design for a building consent rated the dwelling as having a Total Risk Score of 10, which brought it within the provisions for a Category 1 Building.
- [22] The Board reviewed the Risk Matrix evaluation with the Respondent at the hearing. The Respondent accepted that the evaluation of the Wind Zone, Roof/Wall Intersection Design, and the Deck Design scores was incorrect. He stated that the evaluation was done under his supervision and that he did not pick up the errors. He did note that he was under too much work pressure at the time and that he took an approach of doing the minimum required in order to submit for a building consent.
- [23] The Board questioned the Respondent as regards specific flashing details for complex junctions between the roof and the cladding and an existing deck and the cladding. The Respondent noted that there was a general note in the plans that the designer was to be contacted in the event of onsite issues but accepted that he had not provided specific detail.
- [24] Counsel for the Respondent, in her closing submissions, noted:

16. *During the hearing Mr Devani accepted that before lodging the relevant application for Building Consent in this instance, he had not adequately reviewed the details recorded in the E2/AS1 risk matrix and that he had not provided adequate details specific to the construction junctions, and where there were alteration and additions to existing structures.*

⁷ The Risk Matrix is provided for in Part 4 of the Schedule to the Building (Designation of Building Work Licensing Classes) Order 2010.

17. *Mr Devani explains that there are mitigating circumstances which explains how these errors came about.*
18. *During his employment with [Omitted], he was placed under a tremendous amount of stress to complete extremely large amounts of work, with little support, no access to supervision from another experienced designer, and within extremely tight timeframes¹². Mr Devani was regularly working 12-14 hour days, 7 days a week. Whenever he raised his concerns around workload, lack of support he was bullied into delivering work which was below a standard that Mr Devani was satisfied with.*

H1 Calculations

- [25] The plans and specifications submitted as part of the building consent application did not include an H1 calculation. One was requested as part of an RFI. The Respondent stated that he had not picked up that it has been missed.
- [26] The Respondent also failed to note that the design had specified R3.6 insulation with 180mm loft in a skillion roof space but that the rafters were only 140mm in height meaning that there was insufficient space for the insulation and the required 25mm gap between the insulation and the roof cladding.
- [27] The Respondent accepted that it was an oversight. Counsel submitted that the same mitigating factors noted above in paragraph [24] were relevant to the oversight.

D1 Requirements

- [28] The headroom clearance for a new stair access between the converted lower garage and the existing upper house level including the landing and hallway adjacent to the laundry did not meet Building Code requirements in that it was 1855mm high. The noted that it was a cost issue for the client and that he proposed an alternative solution which was, in essence, to allow for a departure from the Building Code requirements in F4 of the Code. The Certificate of Design Work signed by the Respondent did not note any waivers of modifications to the Building Code.
- [29] The Respondent indicated that he might have documentation from the Council with respect to the matter which he would supply to the Board. No further documentation in relation to the issue was filed.
- [30] Counsel submitted:
23. *Mr Devani had extensive discussions with the Council around the design problem he faced, being that the existing building had lower ceiling heights than required. Mr Devani instructs that several possible solutions were discussed with the client, including lowering the floor and raising the ceiling in various places. These solutions would have required engineer involvement, and would have substantially increased the likely costs of the proposed alteration. The cost of both*

these potential solutions would have been prohibitive for this particular client. Given that non-compliance was only minimal (50mm), Mr Devani coordinated an alternative acceptable solution with the Council.

24. *Guidelines provided by the Ministry of Business, Innovation and Employment Building Performance website (supplied and marked as "H", which states that building consent can be provided for an alternative solution which is required by a building owner requiring a "more cost effective solution" or to "overcome a specific site problem").*
25. *Although the Council verbally confirmed to Mr Devani that the proposed solution was acceptable, he neglected to complete page 5 - waivers and modification of the signed Memorandum from LBP: Certificate of design work for this project*
26. *Mr Devani accepts that this was an oversight on his part, but instructs that there were mitigating circumstances (as detailed above at paragraphs 18 and 19).*

F4 Requirements

- [31] The Respondent accepted that he had not provisioned for a balustrade for a deck or for the gap between a deck and the cladding. It was submitted that it was an oversight and that the same mitigating factors applied.

Strip Drain

- [32] The Respondent accepted that connections for the strip drain had not been provided. It was submitted that it was an oversight and that the same mitigating factors applied.

Building Consent Documentation

- [33] The Respondent stated that he reviewed the supporting documentation which was developed using Master Spec. He accepted that the documentation lacked specific details relating to the design and again submitted that the same mitigating factors applied.

Submissions

- [34] Counsel submitted that the conduct did not reach the threshold for the Board to take disciplinary action. The Board decision in C-1207 was referred to. It was submitted:

37. *What is clear from this decisions is that it is not necessary for a LBP to demonstrate perfection in their work in order to avoid a determination that they are either incompetent or negligent. Instead a "serious" lack*

of reasonably expected care and/or demonstrated lack of reasonably expected ability or skill level is what is required.

38. *We submit that these errors were less serious than the omissions and errors made by the designer in BPB Complaint No.C.1207. As such no disciplinary action against Mr Devani is required.*
39. *We furthermore submit that these errors are not evidence of Mr Devani's incompetence or negligence, but an isolated event that has come about due to an unfortunate set of circumstances he found himself in.*
40. *Mr Devani, being a relatively newly qualified designer, lacked the necessary resources to complete the work on [Omitted], to a standard he ideally aims for. He was, over a period of 6 months bullied and pressured by an overbearing and demanding employer to breaking point. He was overworked, exhausted, under-resourced and unsupported. The errors that crept into Mr Devani's work was an inevitable outcome of the unsustainable employment environment he was in at the time.*
41. *Mr Devani now finds himself in an entirely different work environment where he is supported by senior designers, and where he is not placed under the level of pressure he was at [Omitted]. In his new employment there are robust quality assurances measures put in place where his work is peer reviewed internally before it is submitted to any authority. Mr Devani is confident that the quality of his work is back to what it was prior to the unfortunate situation he found himself in at [Omitted], (and likely of an even better quality as he continues to learn from his current colleagues).*
42. *Accordingly, we seek that no adverse finding is made against Mr Devani by the Licenced Building Practitioners Board.*

[35] The Respondent also filed a statement detailing the background to his employment with [Omitted]. The Respondent also stated:

I also acknowledge that the Approved Building Consent Document did not have all the construction junctions and their details + Specifications covered in the Building Consent Documentation. Also, the specification documentation prepared in Masterspec, supervised by me, did not demonstrate the highest architectural drafting and specification standards that I normally aim for. I also note that nothing that I share below can justify the errors made by me in my supervision.

Board's Conclusion and Reasoning

- [36] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent and incompetent manner (s 317(1)(b) of the Act) and **should** be disciplined.
- [37] The Board's considerations as regards negligence and incompetence are in respect of the Respondents design work. It has made its decision on the basis of the Respondent's failure to provide adequate supervision and on the basis of the cumulative effect of the Respondent's failings in respect of the Risk Matrix which should have been assessed the design work as relating to a Category 2 Building, E2, H1, D1, and F4 Building Code oversights and errors, and drainage and supporting documentation issues.
- [38] The Board decided, on the basis of the evidence provided and submissions made that the habitable space created in the garage was not a separate "household unit" as defined in legislation and that, as such, there was not a "change of use".
- [39] Section 7 of the Building Act defines household unit as:

household unit—

- (a) *means a building or group of buildings, or part of a building or group of buildings, that is—*
- (i) *used, or intended to be used, only or mainly for residential purposes; and*
- (ii) *occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but*
- (b) *does not include a hostel, boardinghouse, or other specialised accommodation*

- [40] The evidence before the Board was that the converted garage was to be used by the existing residents and, as such, it was intended to be occupied, exclusively as the home or residence of not more than 1 household.
- [41] Change of use is defined in regulation 5 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 as:

5 *Change the use: what it means*

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

[42] Section 115 of the Act stipulates:

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

(a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and

[43] Section 115 refers to “*the incorporation in the building of 1 or more household units where household units did not exist before*”. In this instance, a household unit previously existed. On the basis of the definition of household unit above, no additional household units were being incorporated. As such there was not a change of use as defined by the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

[44] Given these legal definitions, the Board has not taken the allegation that an additional habitable dwelling was being created into consideration in reaching its decision. The Board does note, however, that more care could have been taken in how the matter was dealt with in the documentation and original building consent application to ensure that the true circumstances of the intended residential arrangements were made clear.

Negligence and Incompetence

[45] Looking at the design work which the Board did find was completed in a negligent and incompetent manner it is to be noted that under the definitions in the Building Act design work forms part of the wider definition of building work and as such, in respect of section 317(1)(b), it comes within the Board’s jurisdiction.

[46] In terms of negligence and incompetence the Board notes that they are not the same. In *Beattie v Far North Council*⁸ 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.

[47] 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, in this case, a licensed building practitioner with a design licence. This is

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

- [48] 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*¹¹ it was stated as “*an inability to do the job*”.
- [49] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². 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.
- [50] 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 Act¹³. 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 practitioner¹⁴.
- [51] 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:*

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 *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

[52] The Board also notes the provisions of section 14D of the Act which states:

14D Responsibilities of designer

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[53] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work, the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design¹⁵.

[54] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁶ 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.

[55] Looking at the building consent application, there were multiple oversights and errors. The Respondent accepted that those oversights and errors had occurred with respect to Risk Matrix calculations, H1 Building Code compliance, E2, D1 Building Code compliance and F4 Building Code compliance as well as with regard to a drainage connection and the adequacy of supporting documentation.

[56] The Respondent supervised the design work to which the errors and oversights related. As such, it is the adequacy of his supervision which is called into question and it is in respect of those failings that the Board has decided that the Respondent has been negligent and incompetent.

¹⁵ Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

¹⁶ [2001] NZAR 74

Supervision

[57] As noted above, the Board's finding's relate to the Respondent's supervision of non-licensed persons. The terms supervise is defined in section 7¹⁷ 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.

[58] 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; and

(d) the number of persons or projects being supervised.

[59] The Board also stated that it ultimately needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[60] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁸. The definition of supervision in that Act is consistent with the definition in the Building Act and, as such, the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

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

¹⁷ 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.

¹⁸ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

- [61] The Respondent submitted that the oversights and errors arose as a result of work pressures and mitigating circumstances around his employment situation and his being a newly licensed designer. Whilst the Board notes those factors, it considers they go to mitigation in terms of penalty, not to the Respondent’s failings as a supervisor.
- [62] Supervision is an important aspect of the licensing regime. It enables the leveraging of extra resources. At the same time, it imposes a duty on the supervisor to ensure that work is completed to the standards expected of a licensed person. In this instance, that did not occur. There were multiple errors which should have been picked up prior to the building consent being submitted and there was evidence that the Respondent was doing the bare minimum and hoping that either the errors would slip through or that the Building Consent Authority would identify them for him.
- [63] In this respect, the Building Consent Authority’s role is to check that the design work has been carried out in accordance with the Building Code. It is not uncommon that a building consent authority will identify issues with designs and specifications. The question the Board will often have to answer is whether those issues should have been identified and dealt with prior to the consent being submitted. Furthermore, it is noted that the building consent authority’s job is to grant or refuse a building consent. It is not its role nor responsibility to assist a designer to develop its designs to the point where they achieve compliance with the Building Code.
- [64] A designer should be aiming to get their design and specifications 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. In this respect it is also to be noted that under section 45(3) of the Act a licensed building practitioner with a design licence must submit a certificate of work with a building consent that states that the design complies with the building code:
- (3) *The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*
 - (a) *provided by 1 or more licensed building practitioners who carried out or supervised that design work; and*
 - (b) *that identifies that design work; and*
 - (c) *that states—*
 - (i) *that the design work complies with the building code;*
 - or*

- (ii) *whether waivers or modifications of the building code are required and, if so, what those waivers or modifications are.*

[65] 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 of the enabling legislation¹⁹:

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 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.

[66] The Board also notes the provisions of section 14D of the Act:

14D Responsibilities of designer

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[67] 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 he has failed, as regards his supervision, to display the knowledge and skill required of a Licensed Building Practitioner with a Design AoP 2 Licence. The Board

¹⁹ Hansard volume 669: Page 16053

further found that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Penalty, Costs and Publication

- [68] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [69] 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

- [70] 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.

- [71] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²¹ 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.
- [72] The Board considered that that Respondent’s failings and approach to supervision were serious. It noted that his Category 1 Building designs were adequate but that it was with respect to the Category 2 Building design that the errors and oversights arose. A Design AoP 2 Licence is required for Category 2 Buildings. Given this, and the relevantly short period of time that the Respondent had held his licence prior to the disciplinary offending the Board considered a suspension of the Respondent’s licence to allow him to gain more experience.
- [73] The Board noted the mitigating factors set out in paragraph [24] and [34] herein. Counsel for the Respondent further submitted:

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

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

19. *In his current employment Mr Devani has in place rigorous Quality Assurance systems, and support from experienced designers. He has learned from his experience with [Omitted] that it is important to maintain a certain quality of work in order to protect his own professional integrity. He has committed to never be pressured into doing work which is not to his usual standards. He instructs that his past errors were due to a lack of experience and confidence to stand up to his overbearing employer, as a newly qualified designer.*

[74] Given the above factors the Board has decided that it will order a restriction on the Respondent's licence to restrict him to Design AoP 1 until such time as he satisfies the Registrar that, on the balance of probabilities, he is capable of carrying out and supervising Category 2 Buildings. This, in effect, means that he will have to be supervised in respect of design work on Category 2 Buildings until such time as the restriction is lifted.

Costs

[75] 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."

[76] 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 case²².

[77] In *Collie v Nursing Council of New Zealand*²³ 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.

[78] 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.

Publication

[79] 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 Act²⁴. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

²² *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.

²³ [2001] NZAR 74

²⁴ 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.

- [80] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [81] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁶. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁷. 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*²⁸.
- [82] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁹. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [83] Based on the above, the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(c) of the Building Act 2004, the Respondent's licence is restricted to the carrying out of the or supervision of design work to that of Category 1 Buildings and the Registrar is directed to record the restriction in the of Register of Licensed Building Practitioners by noting his licence as a Design Area of Practice 1 Licence; and

The restriction is to remain in place until such time as the Respondent satisfies the Registrar that, on the balance of probabilities, he meets the requirements to carry out and supervise design work on Category 2 Buildings.

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.

²⁵ Section 14 of the Act

²⁶ Refer sections 200 and 202 of the Criminal Procedure Act

²⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁸ *ibid*

²⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Publication: The Registrar shall record the Board’s action in the Register of Licensed Building Practitioners in accordance with section 301(l)(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.

[85] 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

[86] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 5 March 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.

[87] 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

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

Signed and dated this 11th day of February 2021



M Orange
Presiding Member

ⁱ **Section 318 of the Act**

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

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- (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
 - (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ii Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*