

Before the Building Practitioners Board

	BPB Complaint No. CB25368
Licensed Building Practitioner:	Matthew Gudsell (the Respondent)
Licence Number:	BP 118911
Licence(s) Held:	Carpentry and Site 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 Type:	On the Papers
Draft Decision Date:	30 March 2020
Final Decision Date:	29 May 2020

Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Rob 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.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) and 317(1)(db) of the Act.

Contents

Introduction	2
Disciplinary Offences Under Consideration	3
Function of Disciplinary Action	4
Evidence	5
Draft Conclusion and Reasoning	6
Negligence – Carrying out Building Work without a Building Consent	6
Holding Out.....	10
Draft Decision on Penalty, Costs and Publication	12
Penalty	12
Costs.....	13
Publication	14
Draft Section 318 Order	15
Submissions on Draft Decision	15
Request for In-Person Hearing	16
Submissions Made	16
Complaint’s Submissions	16
Respondent’s Submissions.....	16
Final Decision	17
Final Section 318 Order	19
Right of Appeal	19

Introduction

- [1] On 30 March 2020 the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.
- [2] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [3] The Registrar made a recommendation that regulation 9(f)(ii) of the Complaints Regulations applied. The Registrar did not provide any reasoning for the recommendation.
- [4] Having received the report and reviewed the evidence and submissions provided by the Complainant and the Respondent and the further evidence received from the Tauranga City Council the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.

- [5] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.
- [6] In this instance the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [7] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. Both the Respondent and the Complainant will be provided with an opportunity to make comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [8] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) in that building work may have been carried out prior to a building consent being granted and that building work the required an amendment to the building consent may have been carried out prior to an amendment being granted; and
 - (b) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act) in that the Respondent may have held himself out as a being a licensed person at a time when his licence was suspended.
- [9] The complaint also contained an allegation that the Respondent had brought the regime into disrepute contrary to section 317(1)(i) of the Act. With regard to that allegation the Board decided that regulation 9(f)(ii) applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

- (f) *the investigation of it is—*
- (ii) *unnecessary*

[10] The reason why the Board has decided not to further investigate the allegation of disrepute is that the Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

[11] On this basis the Board decided that the evidence disclosed did not reach the seriousness threshold required for the Board to carry out further investigations of disrepute.

Function of Disciplinary Action

[12] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

[13] 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*⁵ 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.”

[14] 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 persons⁶:

... 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.

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

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

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

- [15] 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.
- [16] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Evidence

- [17] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [18] The complaint related to building work on a new residential dwelling carried out under a building consent. The consent was issued on 24 October 2018. Building work on the dwelling started on 11 October 2018, prior to the consent being issued. The complaint documentation included email correspondence which showed that site work and foundation preparations were underway from 11 October 2018.
- [19] Prior to the building work being undertaken the Respondent and the Complainant were in contractual discussions from as early as 6 March 2018. The Respondent’s licensing history shows that his Carpentry and Site licenses were suspended from 30 November 2017 to 24 July 2018.
- [20] During the build a change to the building methodology for the foundations was made by the Respondent. The consented method of tilt panels was changed to in-situ poured concrete structural walls. The footings for the changed method were poured on 14 November 2018. An amendment for the change was granted on 27 March 2019.
- [21] The Respondent provided a written response to the complaint by way of his legal Counsel. With regard to the matters at issue the response noted that the Council allowed the building work relating to the change in foundation method to continue but that it required an urgent amendment and that the amendment documentation was outside of the Respondent’s control.
- [22] The response also noted that the suspension was as a result of the non-payment of a fine which resulted from the Respondent changing his postal address and not being aware of the issue. It further noted that once he was aware it was immediately rectified. The response wrongly referred to a brief suspension in 2016 as opposed to the relevant suspension from 30 November 2017 to 24 July 2018.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Draft Conclusion and Reasoning

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

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
- (b) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act)

and **should** be disciplined

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

Negligence – Carrying out Building Work without a Building Consent

[25] The Board's considerations in relation to negligence relate to the carrying out building work prior to a building consent being issued and to building work being carried out prior to an amendment to a building consent being granted.

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

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

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

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

49 Grant of building consent

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

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

doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act as set out in section 3 of the Act.

[29] The evidence before the board was that excavation and preparation work had commenced on 11 October 2018. The building consent was not issued until 24 October 2018.

[30] Section 7 of the Act defines building work as:

(a) *means work—*

(i) *for, or in connection with, the construction, alteration, demolition, or removal of a building; and*

(ii) *on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

(b) *includes sitework;*

[31] Sitework is also defined in the Act:

sitework means work on a building site, including earthworks, preparatory to, or associated with, the construction, alteration, demolition, or removal of a building

[32] From the definitions above it is clear that building work was carried out prior to the building consent being granted. The Respondent, as a Licensed Building Practitioner with Carpentry and Site AOP 2 Licenses, should have known that the work could not precede the issue of the building consent.

[33] It was also clear, on the evidence before the Board, that building work in relation to a significant change to the building consent had been carried out prior to an amendment to the consent being sought and granted. Section 45(4) of the Act states:

(4) *An application for an amendment to a building consent must,—*

(a) *in the case of a minor variation, be made in accordance with section 45A; and*

(b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

[34] It follows that if building work cannot be carried out without a building consent and an amendment to a building consent is to be treated as if it were an application for a building consent that any building work that relates to the amendment cannot be carried out until the amendment is granted.

[35] It should also be noted that whilst a certificate of acceptance can be granted by a building consent authority for building work that is not carried out under a building

consent or an exemption it does not relieve a person from the obligation to ensure building work is carried out under a building consent. Section 96(3) specifically provides:

96 Territorial authority may issue certificate of acceptance in certain circumstances

(3) This section—

(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

- [36] It is noted that the building consent authority (BCA) which, in the case with the District Council, have not followed the strictures of the Building Act and have allowed a retrospective amendment to be granted⁸.
- [37] Turning to the Respondent's role. He was the main contractor and the main licensed building practitioner. He was also the instigator of the changes to the methodology for the in-situ concrete work and foundations. He had a critical role to play in when the building work was carried out.
- [38] In respect of the Respondent's role the board also notes that Justice Brewer In *Tan v Auckland Council*⁹ which dealt with unconsented building work noted:
- [37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
- [38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*
- [39] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to "carrying out" for the purposes of section 40 of the Act.
- [40] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building

⁸ In MBIEBH Determination 2016/046, 26 September 2016 it was noted that a building consent authority needs to ensure that building work does not proceed in advance of the decision to grant an amendment and communicate this to staff inspecting building work. The amendment process was criticised in the determination as the authority failed to notify the site inspector that an amendment had been applied for, allowed the building work to continue outside the scope of the original building consent, failed to issue a notice requiring the work to cease until the amendment was granted, and continued to advise the owner after the work had been completed that the amendment would need to be granted before the code compliance certificate could be issued (when no amendment could be granted because the building work had already been undertaken).

⁹ [2015] NZHC 3299 [18 December 2015]

practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

- [41] The question for the Board to consider is whether the Respondent in allowing building work to be carried out in advance of the consent process has been negligent.
- [42] 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*¹⁰ test of negligence which has been adopted by the New Zealand Courts¹¹.
- [43] The New Zealand Courts have stated that assessment of negligence 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.
- [44] 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 purposes of the Act¹³ which are outlined above. 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.
- [45] In applying this test, the Board has decided that the Respondent's conduct has fallen below that to be expected from a licensed building practitioner. In this respect it is important to note that ignoring the consenting process can have significant ramifications. With regard to the initial building consent there is no guarantee that it will be granted or that it will be granted on the basis of the plans and specifications filed with the BCA and on which the work was presumably being carried out. There is also no guarantee that an amendment will be granted or that the work that is been completed without one will comply with the building code. If it does not remedial work or even deconstruction may be required.

¹⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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 (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

- [46] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

- [47] The Board finds that the conduct was serious. It involved deliberate decisions to operate outside of the consenting process and, as noted in paragraph [28] above, the building consent process is an important one. It is central to the compliance framework under the Act.
- [48] 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.

Holding Out

- [49] The Board's consideration of the charge under 317(1)(db) came about as a result of the complaint and complaint documentation indicating that the Respondent held himself out as being a licensed building practitioner who could carry out or supervise restricted building work at a time when he was not licensed.
- [50] The Respondent's licence was suspended from 30 November 2017 to 24 July 2018. Under section 297 of the Act a person is not a licensed building practitioner when his or her licence is suspended:

Effect of licensing suspension

- (1) *A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.*
- (2) *At the end of the period of suspension, the person's licensing is immediately revived (unless there is some other ground to suspend or cancel that person's licensing under this subpart).*
- [51] The Respondent has submitted that the suspension resulted from his not receiving correspondence as a result of his changing address. The Act, however, imposes a positive duty on a licensed to update the Register on a change of circumstances:

302 *Obligation to notify Registrar of change in circumstances*

- (1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar*

¹⁵ [2001] NZAR 74

of any change in circumstances within 10 working days after the change.

(2) *Change of circumstances—*

(a) *means any change in the information that the person has provided to the Registrar under this subpart; and*

(b) *includes any change that may be prescribed (if any).*

[52] As the Respondent did not provide any updated details the address to be used for communications with him is that contained in the Register.

[53] Section 314 of the Act makes it an offence for a licensed building practitioner to fail to update the Register:

314 Offences relating to licensing

(1) *A person commits an offence if the person holds himself or herself out as a person who is licensed to carry out or supervise building work or building inspection work, or building work or building inspection work of a certain type, while not being so licensed.*

(2) *A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$20,000.*

(3) *A person commits an offence if the person—*

(a) *fails to produce evidence of being licensed as required by section 289; or*

(b) *fails to give written notice of a change in circumstances in accordance with section 302.*

(4) *A person who commits an offence under subsection (3) is liable on conviction to a fine not exceeding \$5,000.*

[54] The Act also provides for the service of notices in section 394. It provides that:

394 Service of notices

(1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*

(a) *delivered personally to the person; or*

(b) *delivered to the person at the person's usual or last known place of residence or business; or*

(c) *sent by fax or email to the person's fax number or email address; or*

(d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*

(5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*

[55] Given the above provisions the Board has little sympathy for the Respondent's submission. It was the Respondent's own failings that led to the suspension.

[56] The Board also notes from the submissions that the Respondent was unaware of the fact that he was not licensed and was continuing to operate as if he was. The building work that he was intending to carry out and which he was representing that he could carry out involved structural and weathertightness elements¹⁶ under a building consent. However, such work can only be carried out by a licensed person:

84 Licensed building practitioner must carry out or supervise restricted building work

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

[57] On the basis of the above the Board has decided that the Respondent did hold himself out to be a licensed person at times when he was not so licensed.

Draft Decision on Penalty, Costs and Publication

[58] 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.

[59] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[60] 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*¹⁷ 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

¹⁶ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) defines what is restricted building work. The work described in the complaint came within one or more of those definitions.

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [61] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [62] The most serious matter before the Board's finding of negligence. The Board's penalty considerations and decision is based on that finding.
- [63] The negligence found was at the higher end of the scale. There was a disregard for consenting processes which put the purposes of the Act at risk. A commensurate penalty is required. There are no real mitigating factors. The Respondent may, however, be aware of mitigating factors that the Board should take into consideration and as such he is invited to make submissions on penalty.
- [64] Based on the above, and in line with previous decision for similar conduct, the Board's penalty decision is that the Respondent pay a fine of \$3,500.
- [65] The Respondent should note that his previous offending before the Board has not been taken into account in setting the penalty as the Board accepted that it was for unrelated conduct.

Costs

- [66] 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."
- [67] 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 case¹⁹.
- [68] In *Collie v Nursing Council of New Zealand*²⁰ 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.*
- [69] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been

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

¹⁹ *Coaray 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.

²⁰ [2001] NZAR 74

incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[70] 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 Act²¹. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

[71] 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.

[72] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. 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*²⁵.

[73] 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 interest²⁶. 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.

[74] Based on the above the Board will not order further publication.

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Draft Section 318 Order

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

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

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[76] 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 Draft Decision

[77] The Board invites the Respondent and the Complainant to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[78] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **19 May 2020**. They are only to relate to the Board's Conclusion and Reasoning and on matters of penalty costs and publication. Submissions are not sought with regard to the Board's decision not to proceed with an allegation because regulation 9 of the Complaints Regulations applies. The Complainant should note that if new compelling evidence that was not available at the time the regulation 9 decision not to proceed was made then a further complaint in respect of the matter may be made.

[79] If submissions are received, then the Board will meet and consider those submissions.

[80] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

[81] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [82] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [83] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **19 May 2020**

Submissions Made

Complainant's Submissions

- [84] The Board received a submission from the Complainant's Counsel dated 19 May 2020. The Complainant included a number of attachments including engineering plans and detail.
- [85] The submissions noted the Board's decision not to further investigate disrepute under regulation 9(f)(ii) of the Complaints Regulations and submitted that the Board should revisit that decision based on the overall conduct including that there was an alleged element of underlying dishonesty and a high level of negligence in quoting. Reference was made to a previous Board decision in which the Board found that the respondent had been negligent as regards significant errors in quoting.²⁷
- [86] Submissions were also made as regards the proposed level of penalty. It was submitted that previous offending should be taken into account, that there was a pattern of disregard for processes and that the penalty did not reflect the level of negligence displayed.

Respondent's Submissions

- [87] The Board received a submission from the Respondent's Counsel on 25 May 2020. Counsel raised issues with the Board's findings that the Respondent made a deliberate decision to operate outside of the consenting process and that there were no real mitigating factors. The submissions included correspondence and documentation in support of the submission and a submission that *Tan v Auckland Council* did not apply.
- [88] The submissions also compared the Board's indicative penalty to a previous Board decision²⁸ and submitted that the Board's proposed penalty was inconsistent with the findings in that matter. The submission noted a discount was applied to the penalty in C2-01801 and that the Respondent's conduct was not as culpable as the conduct in the former matter. Counsel noted that it was not uncommon for Councils to disregard the consenting process and that this should be taken into account.
- [89] Finally, Counsel submitted that the Board should disregard the Complainant's submissions.

²⁷ Board Decision C2-01688

²⁸ Board Decision C2-01801

Final Decision

[90] The Board has, since it made its Draft Decision, been provided with new evidence that is relevant to the matters before it. In particular, the additional engineering plans and details. That information has clarified issues as regards tilt panels versus in-situ concrete. The Board notes, from the engineering plans and detail provided, that as early as May 2018, and prior to the Respondent being involved, the wall in question was detailed as in-situ poured wall on pre-consent designs (Engco, Foundation Details and Specifications, May 2018 dwg S3). On 27 June 2018, when the Respondent was involved, he was emailed the May 2018 version of the plans for pricing with an in-situ wall detailed.

[91] The change the Respondent wanted to make was with regards to the exposed reinforcing steel and the positioning of the formwork. The preliminary plans sent to the Respondent on 27 June 2018, and the consent plans, detailed reinforcing bars left exposed to tie into the poured concrete wall with the slab poured first and then the walls. The amended plans showed the Respondent's methodology, and detail of a change to reid inserts cast into the wall for foundation and slab reinforcing and an additional foundation pour to support the walls. The ribraft floor system was poured after (not before) the walls.

[92] An email of 27 June 2018 from the designer to the Respondent stated:

As discussed please see attached the plans & specification for (redacted) and ready for pricing.

The Engineer has not yet changed the foundation design plans yet however if you could price off the attached and maybe include an additional amount to take into account the extra concrete etc that will be fine. Once the plans have been changed I'll flick these through for you to confirm your price still stands

Apart from that, I'll be lodging these plans to Council by Friday and like always changes may occur due to processing

[93] Then, in early October 2018, a start is made on-site with excavation and site prep taking place. On 17 October 2018, the Respondent emailed the engineer:

We could pour floor as you have drawn but all the reinforcing steel from the ground level line will need to be left exposed and poured in with the walls, this makes pouring the floor very difficult or from my point of view impossible because we would have to form the rebate you have drawn out of timber around all the reinforcing steel. Normal way to do it is sit the shutters on a footing pour walls and reid dowel floor steel in.

[94] The change in construction methodology would most likely not have resulted in significant changes to the foundation footings under the concrete walls. The Board has noted, however, that the consented plans had minimal foundations under cantilevered walls which are, in places, two storeys high. It is unlikely that those foundations, as designed and consented, would have been adequate. Changes were

somewhat inevitable, and it is noted that the amended design has incorporated “additional” concrete foundations under the existing consented concrete ribraft system. The concrete walls sit on these new foundations and are tied into the ribraft. The ribraft foundation and floor slab has also be increased in design by perimeter beam, reinforcing and internal beams.

- [95] The Board is of the view that the amendments noted above were not connected to the Respondent’s methodology of constructing the staged pours. Rather the original design did not adequately take into account the height and loads of the concrete wall it was to carry.
- [96] What is apparent, as regards the Respondent’s conduct, however, is that engineering design changes were hi-lighted in early November 2018 but the building consent amendment to cover them was not approved until 26 March 2019. The concrete in-situ wall and their foundations had, however, all been poured by the Respondent in advance of the amendment.
- [97] Given the above, the Board is still of the view that the Respondent has carried out building work requiring an amendment prior to the amendment being issued. The finding of negligence is therefore affirmed for the reasons outlined in paragraphs [25] to [48] herein with the factual changes now noted.
- [98] The Board does not accept the submission made on behalf of the Respondent that the Board should, in essence, look past the transgression. It may be that some Councils do not always strictly enforce consenting requirements. That does not mean, however, that the Respondent’s behaviour should be excused. The purpose of the licensing regime was to improve standards and to make licensed persons accountable.
- [99] With regard to disrepute the Board does not consider that the additional foundation costs were necessarily related to the Respondent’s work. On reviewing the new evidence received together with the other documents before the Board it appears additional costs may relate to or have resulted from underlying engineering design issues. The Board does not, however, make a finding in this respect as it remains of the view that the allegations of disrepute do not reach the required threshold and as such further investigation is not necessary. The Board will not review its regulation 9(f)(ii) decision as regards disrepute.
- [100] The Board does find, based on the new evidence, that the degree of negligence displayed is not as high as initially found. On this basis, it will review its penalty decision.
- [101] The Board has decided the fine will be reduced to \$2,000. In making the reduction, the Board has also taken into account its penalty findings in other matters that have come before it. The costs order will remain the same.

Final Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

Right of Appeal

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

Signed and dated this 8th day of July 2020



M. J. 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*
 - (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.*